THE

INDIAN SALE OF GOODS ACT, 1930.

(ACT IX OF 1930)

Commercial Laws of India (Vol. I).

THE

Indian Sale of Goods Act, 1930.

(ACT IX OF 1930)

(With an exhaustive, critical and analytical commentary, up-to-date Indian & English case-law, index, table of cases, and several useful appendices).

By

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FOREWORD

Sale of goods covers a larger range than probably any other commerical transaction. The law on the relations of buyer and seller, therefore, needs to be widely known. In India that law is contained in the Sale of Goods Act, 1930. It is based upon the English Act on the subject and adapted to India conditions. A good commentary of the Indian Act, pointing out the departures from the English law, and explaining the Indian law is sure to be useful to the profession and to the public generally. Mr. Om Praksah Aggarwala's book contains practically all that is wanted for ordinary purposes. He has spared neither industry nor discrimination in its preparation. I trust the book will have a wide welcome.

B. L. MITTER,

Advocate-General of India.
(formerly) & Law Member,
of the Council of
the Governer General.

PREFACE TO THE SECOND EDITION

I am highly grateful to all those who had the occasion to use the first edition of this book for their kind apprection of my work and affording me opportunity to present it in its revised form. In preparing the present edition I have rewritten some of the portions with a view to making it fuller than the previous one. The result has been a considerable addition of useful matter both in the text and in Appendices, The case-law cited is complete up to December, 1945 and about two hundred new cases have been digested in the book. The index has also been completely overhauled and its utility increased by adding cross-references where necessary. It is hoped that this book in its present form will be found by the legal public even more useful than the previous one.

I have to thank the printers and the publishers for the fine printing and the nice get-up of the book. Inspite of good quality of paper used and superior binding, the price fixed is very moderate.

Any suggestions for the improvement of this book will be thankfully received and gratefully acknowledged.

O.P.A.

PREFACE TO THE FIRST EDITION

The law of sale of goods as contained in Chapter VII of the Indian Contract Act represented generally the English law on the subject as it then stood, except in regard to the rule as to market overt. The rules of English law relating to the sale of goods had in turn grown up mainly out of judicial decisions, and along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. These had undergone drastic changes since 1872 and were finally codified in 1893 as the (English) Sale of Goods Act, 1893 (56 and 57 Vict. C. 71); which discards many of the old common law rules upon which chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice. Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time revealed defects the removal of which became necessary in order to keep the law abreast of the developments of modern business relations. Opportunity was therefore taken in 1929 to frame a Bill mainly based on the English Sale of Goods Act, 1893. It was examined in detail by a Special Committee appointed by the Government of India for the purpose and was found generally suitable with some modifications, and ultimately resulted in the Indian Sale of Goods Act, 1930.

In preparing this treatise on the Indian Sale of Goods Act, 1930, it has been my object to provide a book which should deal with the subject exhaustively and serve as a reference book for those who have to administer this Act. I have tried to elucidate all the principles underlying the rules formulated in its several sections, and to illustrate those by instances carefully selected from reported decisions. In an Act based on an English Act of 1893 references to English case-law on the subject must necessarily be frequent, as the Table of Cases will show, and some confusion is likely to be caused if the back-ground of these decisions is not pointed out and it is not explained to what extent the provisions of the Indian Act differ from the English Act. It has been my endeavour to avoid the possibility of such confusion in this work.

The subject has been properly analysed and treated under appropriate heads and sub-heads. Case-law, both English and Indian, quoted is complete up to December 1940. Nine useful appendices have been added to add to the utility of the book. The two appendices on 'C. I. F. F., O. B. and Ex-ship Contracts' and 'Conflict of Laws' will be found specially useful in actual practice. I have also not been unmindful of the persistent demand of the legal profession for an exhaustive and complete Index in all books on law, and I have tried to meet it in this work to the best of my ability.

It is my pleasant duty to acknowledge the abundant assistance I have derived in the preparation of this book from standard treatises

on the subject, both in England and in India, such as "Benjamin's Sale of Personal Property," Chalmer's (English) Sale of Goods Act 1893; Pollock and Mulla's Indian Sale of Goods Act, 1930; and the various law reports and journals published in this country as well as in England, to which references have been made at appropriate places.

I owe a deep dept of gratitude to Sir B.L. Mitter, K.C.S.I., Bar-at-law, (formerly) Advocate-General of India, the author of this Act as Law-Member of the Council of the Governor-General and as president of the Special Committee, for his very generously contributing a *Foreword* to this book. He was kind enough to spare even amidst his pressing engagements most willingly his time to go through the pages of this book and his encouraging words I regard as my valuable asset as an humble student of law.

I am grateful to Mr. N. K. Iyer, M. A., B. L. for his valuable assistance in various ways in the preparation of this book.

I have also to thank the publishers for clear printing and nice get-up of the book and in spite of the best paper used at the time when prices have gone up considerably, the price kept is very moderate.

Suggestions for improvement of this book for the next edition will be most thankfully received.

OM PRAKASH AGGARAWALA

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(1) **Sale sf Goods**—*Appropriation to contract—With- drawal of valid tender—Subsequent invalid tender—Effect.*

There was a contract dated 3rd August, 1938, for purchase of 15,000 quarters 2 per cent, more or less of corn and an additional option to the sellers of shipping a further 3 per cent more or less. It provided for separate documents for each 1,000 quarters and that each 1,000 quarters was to be considered a separate contract. On 27th August, 1938 the sellers wrote to the buyers "About 15,444 quarters corn have been shipped per "Generton"; bill of lading dated—which we appropriate in fulfilment of the above contact." On 6th September the sellers sent to the buyers a provisional invoice "........of a parcel of No. 2 yellow corn shipped per S. S. 'Generton' from Albany to Hull sold to Bailey, son & Co, Hull as per contract dated 3rd August, 1931." After stating the contract quantity, viz. 14,444 quarters it, in effect, stated that there were 15 bills of lading for 1,000 quarters each and one for 444 quarters, in bulk and/or ship bags. The buyers rejected it as not in accordance with the contract and wrote that the contract must be treated as repudiated in its entirety. On telephone information of this on 7th September, 1938, the sellers purported to withdraw the provisional invoice and substitute an amended invoice for 15,000 quarters with 15 bills of lading for 1,000 each. On 8th September, 1938, the buyers insisted on arbitration upon the question as to whether or not they were right in rejecting the first appropriation, treating the amended bill as inoperative. The arbitrators differed and the umpire decided that the buyers were not entitled to reject. The buyers appealed to the appeal committee which decided: (1) The notice of appropriation of 27th August, was an exercise by the sellers of their option to ship 2 per cent, more or less and a further 3 per cent, more or less on the contract quantity making the contract one for about 15,444 units (the word 'about' allows only a variation of fractions and does not reserve a right to re-exercise the option). (2) The provisional invoice was a valid tender in accordance with the custom and practice of the trade and the terms of the contract. (3) The tender of the invoice of 7th September was invalid as it was not a tender of the contract quantity as declared by the notice of appropriation and the provision in the contract that each 1,000 units were to be considered a separate contract does not affect the obligation of the sellers to tender such contract quantity and held in favour of the buyers. On a special case Branson, J., (in 1939 1 All. E. R. 115) reversed the finding and held that the sellers were entitled to send the second invoice and that the buyers were not entitled to reject it. The court of Appeal reversed the decision and restored the award of the appeal committee. The House of Lords *held*, the contract was an indivisible one for 15,000 units and the rejection of the first invoice was a breach which was not waived by the bare fact of sending of the second invoice which was merely an attempt on the

part of the sellers to meet the buyer's objection. There was no repudiation of contract by the sellers[1].

(2) **C. I. F. contract**—*Bills of lading—Form in accordance with custom of particular trade—Validity of tender.*

The characteristics generally required by the common law to exist in a bill of lading, if it is to be a good tender, under a C. I. F. contract, are so required only because it is the general custom of merchants that such a bill of lading shall possess those characteristics If in any particular trade there is a custom that bills of lading should have other characteristics in addition to or in substitution for those generally required by the custom of merchants, then, in that trade, bills of lading, to be good tender need only conform to that custom.[2]

(3) **Condition "one-third on deck"**—*More than one-third shipped on deck—Right of rejection.*

A contract for sale of timber contained the provision to be loaded, on deck one-third and shipment January and February one-third". More than one-third was shipped on deck. Buyers rejected the parcel.

Held, the buyers were entitled to reject.[3]

(4) **Delivery of goods contracted for mixed with goods of different description**—*Buyer's right to reject—Acceptance and appropriation of part of the goods to contract—If affects buyer's right to reject.*

Where the sellers delivered to the buyers the goods they contracted to sell mixed with goods of a different description not included in the contract the buyers are entitled to reject the whole. The fact that part of the goods had been accepted by the buyers and appropriated to the contract does not prevent the buyers relying on the right to reject.[4]

(5) **Section 16 (1) (corresponding to section 14 (1) of the English Sale of Goods Act)**—*Implied condition that goods shall be reasonably fit for the particular purpose, expressly or implied by made known to the seller—Applicability to abnormalities unknown to seller.*

Plaintiff bought from defendants a tweed coat special made for her. Shortly after she began to wear the coat she developed dermatitis and brought the action to recover damages for alleged breach of implied condition of fitness for the particular purpose under section 14 (1) of the English Sale of Goods Act. The finding was that no normal skin would have been affected by the cloth.

Held, in this particular case the judge has found the existence of an abnormality and that being so it was impossible to say that the seller had the particular purpose pointed out to him so as to show that the buyer relied on his skill or judgment and section 14 (1) did not apply[5].

1 Smyth & Co. v. Bailey & Co., (1940) 3 All. E. R. 60 (H L)=56 T. L. R. 825 reversing (1939) 3 All. E. R. 175=55 T. L. R 811.

2 N. V. Arnold Otto Meyer v Aune=(1939) 3 All. E. R 168 (K. B. D)=55 T. L. R. 876.

3 Messrs. Ltd v. Morrison Export Co. Ltd. (1939) 1 All. E. R 92 (K. B.)=55 T. L. R. 245.

4 London Plywood and Timber Co. v. Nasik Oak Extract Factory and Steam Saw Mills Co., 108 L. J. (K. B.) 587=L. R. (1939) 2 K. B. D. 342=55 T. L. R. 826=1939 W. N. 234.

5 Griffiths v. Peter Conway Ltd.=(1939) 1 A. E. R. 685 (C.A.).

(6) **Sale of Goods**—*Factors Act, 1889, section 8—purchase of a car by agent on behalf of his principal—Car let on hire by agent to an impecunious employee of the seller—Transaction colourable one—Agent aware of it—Possession continuing with the seller—Seller letting out on hirepurchase agreement to a third person—Third party so taking it in good faith—If purchasers can claim it from such party.*

The plaintiff company, in the course of their business, buy motor cars in cash to let them under hire-purchase agreements to would--be purchasers who are not prepared to pay the whole price at once. In 1935 their branch Manager T bought for and on behalf of the company a motor car from C and let it on hire to F an employee of C. F had no private means of his own and was not in a position to buy a car on any terms. He was induced by C to sign on hire-purchase proposal on one of plaintiffs' company's printed forms under which 60 l. had to be paid in cash and balance in 18 monthly instalments. T to help C to carry through the transaction, which he knew was not genuine, drew a cheque in C's favour for 180 l. the balance of the car's price. F had paid nothing, even the 60 l. having been paid by C. F signed a delivery form for having received delivery. The whole transaction was colourable in the sense that C. F and T never intended that F's part in it should be a real one. The car was with C, and was held by him in his own right and not as bailee for F. Some months later C as owner agreed to let the car to the defendant under a hire-purchase agreement, with an option to purchase it as per its conditions, in consideration of 140 l. paid as advance and small monthly instalments. It was found that the defendant took the car in good faith, and without notice of any previous sale by C.

Held, that as a result of section 8 of the Factors Act, 1889, the defendant got a good title. Section 8 says, "where a person, having sold goods, continues, or is, in possesssion of the goods..................... the delivery or transfer by that person............of the goods............ under any sale, pledge or other disposition thereof... ....to any person receiving the same in good faith and without notice of the previous sale, have the same effect as if the person making the delivery of transfer were expressly authorised by the owners of the goods to make the same;" At different stages of this transactiou the plaintiff company had exercised the right at the date of the delivery of the car to the defendant. C was not the bailee of F, as he never gave possession to F nor did be ever attorn to F. The original contract with F was a contract "personal to the hirer" and it cannot therefore be said that F was a nominee of C[1].

(7) **Sale of Goods**—*Sale of a crane for a deferred payment Delivery of crane to purchasing company—Annual payments to be made for depreciation and interest—Amount paid for the depreciation to be taken into account when full pruchase price paid Construction of contract*—Sale of Goods Act, 18—Applies only when a contrary intention does not appear.

By a contract of sale of a crane it was agreed that the purchasing company should take over the crane for a deferréd purchase

1 Union Transport Finance Limited v. Ballardie (1937) I K. B. 510=106 L. J. (K. B.) 268=156 L. T. 142.

price of 4,000 l. that until the completion the purchaser should pay at a particular rate per year for interest and depereciation, that of these sums the sums representing depreciation are to be deducted from the 4,000 l. in order to arrive at the balance actully to be paid by him on completion of the purchase whenever that may take place, than in the meantime the purchaser is to have entire charge of and responsibility for the crane in every respect. The purchasing company made some payment but before payment of the whole purchase price of 4,000 l. the company went into liquidation. The interim liquidator shortly after entered into a contract to sell all the assets of the purchasing company to a new company, which was also sanctioned by the court. The question was if his crane was also included in the assets of the interim liquidator, that is whether it was a crane 'belonging to the old company and used in connection with the said business.' The vendors claimed that the liquidator must either accept the obligations under the contract or return the crane.

Eve J. held that the property in the crane passed to the purchasers on the making of the contract in accordance with section 18, R.I. of Sale of Goods Act, 1893 (1936 1 Ch. 211). *Held*, on appeal, that section 18 does not apply here, because it can only apply according to to its terms unless a different intention appears, namely, that the property should not pass until the purchase is completed. The purchasing company were merely bailees responsible for its preservation to the owners, that is, the vendors. The vendors were therefore right in claiming as against the purchasing company the balance of the moneys which are due under the contract, as in the circumstances the official liquidator must be deemed to have adopted the agreement for sale of the crane[1].

(8) **Sale of Goods—Approval of sample condition precedent to payment—Not operative where condition cannot be fulfilled owing to buyer's default.**

The defendants agreed to buy a quantity of goat hair from the plaintiff's branch in Sudan at an agreed price c.i.f. the buyers to pay cash after the approval of the goods at the port of arrival. No mention was made as to who was to obtain an import licence under the Import of Goods (Control) Order, 1940, and each party was under the impression that it was the duty of the other. When the goods arrived the buyers had already accepted the shipping documents and, as there was no licence to import the goods, they were seized by the customs and forfeited. The sellers claimed the price of the goods from the buyers. The buyers contended that the duty to obtain the licence was on the sellers and that approval of the goods was a condition precedent to the obligation to pay:—

HELD: (i) the property in the goods passed to the buyers at latest when they received the shipping documents. Both under the contract and under the legislation affecting the matter the buyers were the importers and the duty to obtain the licence was upon them;

(ii) the defence that approval of sample was a condition precedent to the obligation to pay was not available to the buyers as the condition could not be fulfilled owing to their default.

Mitchell Cotts & Co. Ltd v. *Hairco, Ltd*, (1943) 2 A.E.L.R. 552.

1 In re Anchor Line (Henderson Brothers), Limited=(1937) 1 Ch. 3 =105 L. J. (Ch.) 550=155 L. T. 100.

(9) Sale of Goods-Contract-Sale by sample-Breach of condition as to quality-Offer by defendants to accept return of undisposed stock-offer rejected-Damages-Mitigation-Duty of plaintiffs to ascertain precise meaning of offer-Sale of Goods Act, 1893 (c.71), Ss. 35, 56.

Under agreements made in September, 1942, the defendants sold by sample and delivered to the plaintiffs 306 dozen men's braces of which the plaintiffs resold 83½ dozen to various retailers. Complaints having been received in January, 1943, from some retailers about the quality of the braces, the plaintiffs after investigation of the matter commenced proceedings that the braces did not correspond with the sample. After the issue of the writ the defendants offered to accept the return of the undisposed stock and to refund the purchase price, provided the braces were in the same condition as at delivery. In the course of the ensuing correspondence between the parties the defendants pointed out that the offer was not made for the purpose of disposing of the action. The offer was rejected by the plaintiffs on the ground that the production of the braces in court was essential to thir case. It was found as a fact that the bulk of the braces did not correspond with the sample and that the offer of the defendants to accept the return of the goods was genuine and put forward for sound commercial reasons:—

HELD:. (i) if the offer of the defendants was meant as an offer to compromise part of the claim, the plaintiffs were under no obligation to accept it. If it was an offer outside the action altogether and without prejudice to any legal rights of the parties, the plaintiffs ought to have accepted it in discharge of their obligation to mitigate the damages. Since it was not clear in which sense the offer was meant, the plaintiffs had acted unreasonably in refusieg it without first ascertaining its precise meaning.

(ii) the amount of damages to which the plaintiffs would otherwise have been entitled, had, therefore, to be reduced.

Houndsditch Warehouse Co. Ltd v. *Waltex, Ltd.*, (1944) 2 A. E. L. R. 518.

(10) *Sale of Goods - Machine tools - Hire - purchase agreement- Conversion of goods by hirers-Claim by owners for damages-Owners' property in goods originally obtained in controlled price Order- Whether illegality vitiated-hire-purchase agreement.*

The appellants hired machine tools from the respondents under three written agreements. The tools were the property of one Smith, who sold them to the respondents in order that the appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the respondents. After making some only of the agreed payments, the appellants converted the tools to their own use by selling them. The respondents, thereupon, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion. For the appellants it was contended· (i) that the sale between Smith and the respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the appellants and the respondents being affected by the illegality arising from the original sale ; (ii) that the

respondents' claim, therefore, should not be entertained on the ground of public policy. The respondents, whilst not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of the conversion:—

HELD: (i) whether or not the agreements for sale were illegal, the respondents' right to their own property was unaffected.

(ii) no question of public policy therefore arose.

Bowmaker's, Ltd v. *Barnet Instruments, Ltd,* (1944) 2 All. E. L. R. 579.

Contract-Acceptance of offer subject to war clause-if completed contract.

An offer from an intending purchaser of goods was accepted by the seller "subject to war clause." There were many kinds of war clauses in use and it did not appear that any particular war clause was in the minds of the parties. In the circumstances,

Held, that there was no completed contract as there was no ***conseneus ad idem.***

Bishop & Baxter v. *Anglo Eastern Trading and Industrial Co, Ltd* (1943) 2 A. E. L. R. 598.

(12). *Delivery of goods "on sale for cash or return"- when property passes to buyer - Bankruptcy of buyer - Vesting of goods.*

D delivered certain articles of furniture to F "on sale for cash or return within a week." The articles were seized in execution by a creditor of F within there days of delivery. D claimed and obtained delivery of the articles and on the adjudication of F as bankrupt the trustee in bankruptcy claimed the articles as property vested in him. *Held*: The property in the goods did not pass to F in the circumstances of the case and the trustee was not entitled to them.

In re Ferrier: Exparte The Trustee v. *Donald (1944) 1 Ch. 295.*

(13). *Purchase tax-Price agreed without mentioning who was to bear the purchase tax-Incidence of purchase tax.*

If one orders another to make and fix curtains at his house the contract is one of sale, though work and labour is involved in the making and fixing. The transfer for a price of the curtains to one who had no previous property in them is a sale of goods. Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. It is for the seller to quote a price which includes the tax if he desires to pass it on to the buyer ; if the buyer agrees to the price it is not for him to consider how it is made up, or whether the seller has included the tax or not. Where however the parties omitted to take purchase tax into consideraction the incidence of the tax must lie where it falls-that is on the seller.

Love v. *Norman Wright (Builders), Ltd.,* (1944) A. E. L. R. 618 (C. A).

(14) Contract-Breach in respect of goods not replacable-measure of damages is profits which purchaser would have made.

Leavy and Company v. *Hirst and Company,* (1943) 2 A.E.L.R. 584=(1944) 1 K. B. 24 (C.A).

(15) *Sale of Goods-C.i.f. contract-Contract in common form-Special clause as to service of notices added-Compliance with special clause condition precedent.*

In a contract of sale c.i.f., which contained a common form appropriation clause a further clause, was inserted providing that all notices had to be sent to the buyers agents in a certain place, and that documents also had to be sent there for payment. Such notices were in fact sent to the buyers personally in another place. It was contended that compliance with the provisions of the added clause was a condition precedent to the right to enforce the contract:—

HELD: the added clause was a contract, strict performance of which was required. It was a stipulation going to the root of the contract, and therefore, overrode the appropriation clause.

Luis De Ridder, Ltd. v. *Andre and Cie. S. A. (Lausanne)*, 1941, 1 A.E.L.R. 380.

(16) *Sale of Goods-Agreement giving use subject to payment of interest and depreciation-whether sale with provision for instalment to sell-passing of property.*

A shipping company A. succeeded a shipping company B. as occupiers of a basin, and agreed to take over a crane from B. on the following terms: Deferred purchase price £4,000 annual payments of "interest" and "depreciation," the total amount paid for depreciation to be deducted from purchase price on completion of purchase, whenever that mignt take place. A. to have entire charge ot and responsibility for the crane. A. paid regularly for some years and then went into liquidation, and the liquidator contracted to sell the assets, including the crane, to a new company. B. maintained that the property in the crane had not passed to A., and claimed that the liquidator should either adopt the contract or pay the remainder of the purchase price:-

HELD: (i) the property in the crane had not passed to A.

(ii) the liquidator, as an officer of the court, must be assumed to have intended to put himself in a position in which he could give a good title to a purchaser of the crane, and this he could only be by paying the amount of the purchase price outstanding.

Re Anchor Line (Henderson Brothers), Ltd., (1936) 2 A. E. L. R., 911.

(17) *Sale of Goods-Default by seller-Express power of re-purchase-Special procedure under power-Availability of common law remedy-Exercise of common law remedy and exemption from liability to account under express power.*

By certain contracts for the sale of wheat it was provided by clause 5: "In default of contract by either party, the other, at his discretion, shall, after giving notice by letter or telegram, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any. on such re-purchase or re-sale on damand. In case either party shall suspend payment, he shall be deemed to be in default, and the other party shall, after giving notice by letter or telegram to the defaulting party, and notwithstanding any bankruptcy or liquidation, be entitled immediately to re-sell or re-purchase, as the case may be, and shall also be paid, or to prove in any bankruptcy, liquidation or otherwise, for the loss, if any, or shall

account for the profit, if any, occasioned by such re-sale or re-purchase." Before the arrival of the first of the ships which were carrying the parcels appropriated to the various contracts, the sellers suspended payment. The buyers becoming aware of this, proceeded to buy wheat of the description which they were expected to get under their contracts with the sellers, in order to have wheat to deliver in fulfilment of the contracts which they had made. No notice of any kind was given to the sellers of such purchases. The liquidator of the sellers claimed against the buyers the difference between the sellers and the buyers and the price at which the buyers purchased the wheat of similar quality and quantity:—

HELD: (1) in the event of payment by one party, the party not in default had an option either to wait until the time for fulfilment of the contract and exercise his common law rights in respect of the default of fulfilment or to proceed under clause 5, and re-sell or re-purchase as the case might be. In order to proceed under this clause, he must give the notice required by the clause and he would be under a liability to account.

(ii) the buyers, having given no notice, had not proceeded under clause 5, and were not liable to account to the sellers.

Shipton, Anderson & Co. Ltd. v. *Micks & Co.* (1936) 2 A. E. L. R. 1032,

(18) **SALE OF GOODS**-*Auctioneer providing funds for purchase of pigs - Purchaser removing pigs after signing note acknowledging receipt of the pigs (that pigs were auctioneers' property and could be removed and sold by them) - Bankruptcy of purchaser -Right to the pig.*

Auctioneers had provided funds for purchase of pigs by a farmer who before removing them signed a note acknowledging receipt of the pigs and stating that pigs were the auctioneers' property and could be removed and sold by them. On the bankruptcy of the farmer the auctioneers seized and sold the pigs and claimed to retain the sale proceeds against the trustees in bankruptcy. The auctioneers claimed that the farmer was their agent in the purchase of the pigs and the arrangement was to give them a security.

Held, [affirming (1939) 4 All. E. R. 554] the farmer was not an agent of the auctioneers and the property in the pigs passed to him and the trustee in bankruptcy was entitled to the sale proceeds of the pigs.

Re Capon : Trustee in Bankruptcy v. *Knight* (1940) 1 ch. 442 =(1940) 2 All. E. R. 135 (C. A.)

(19) **Sale of Goods**-*Sale to finance company and hire purchase arrangement between finance company and ultimate purchaser-Breach of warranty of fitness-Purchaser not entitled to sue the vendor to finance company.*

At the time of a supposed purchase the purchaser entered into a hire purchase agreement of quite a common kind with a finance company. The document recorded the relationship of hire purchase between the hirer and the owner in the form of an offer made by the hirer on a printed form signed by the hirer on May 11, 1938. On the same date a document purporting to be an invoice was signed by the dealer purporting to invoice the apparatus to the hirer. In an action

by the hirer against the dealer alleging a breach of warranty of fitness of the apparatus it was contended that the transaction was a sale and not of hire and that the defendant was liable as vendor for the breach of warranty.

Held, that the contract was one of hire purchase and the issue of the invoice did not make it one of sale and the action must fail.

Drury v. *Buckland, Ltd.* (1941) 1 All. E. R. 269 (C. A.)

(20) **SALE OF GOODS ACT, S. 4.**—*part payment of purchase price and contract to make further payments within a time - Default of buyer in making further payments-No tender nor delivery of goods by seller-Right of buyer to return of the purchase price paid-Right of the seller to damages for the breach of contract-Quantun of damages-Loss of profits which seller would have made-If to be included.*

Where there is a contract for the sale of goods, and a part payment for the goods is made, but no goods are delivered or tendered by reason of the default of the buyer the seller's only remedy is to recover damages for the default while the buyer, notwithstanding that it is by reason of his default that the contract has not been performed, is entitled to recover the purchase price that he has paid. subject to the right of the seller to set off against that claim the damages to which he can establish his title. The true measure of damages which the seller is entitled to is the loss of net profit that the seller would have made on the deal.

Dies and Another v. *British And International mining and Finance Corporation*, L. R. (1939) 1 K. B. 724=161 L.T. 196.

INDIAN DECISIONS.

(1) **Contract-Sale of goods-Deed written-previous offers and acceptances become mere negotiations.**

When a contract of sale of goods has been embodied in a written deed the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptances are merely stages in the negotiations between the parties.

Section 73 of the Indian Contract Act, 1872, lays down the general principle of law where there is no provision in the deed of contract regarding re-sale. The re-sale in such circumstances must take place within a reasonable time. The purchasers can, however, agree to given uncontrolled discretion regarding the time of the re-sale to the sellers and they can also agree that they will not raise any objection regarding a re-sale taking place after an unreasonable lapse of time. Such a clause though harsh is not unconscionable or illegal in mercantile contracts. There can be no question in a mercantile contract of one party being able to dominate the will of the other party or to over-reach it. In such circumstances the Court cannot relieve the purchaser on equitable grounds of the effect of a harsh or onerous term to which he has agreed by means of a solemn written contract:

Ordinarily no interest is allowed on the amount of damages arising out of contract. But interest may be allowed if there is an agreement for payment of interest at a fixed rate or is payable by usage of trade having the force of law or under the provisions of any substantive law entitling the plaintiff to recover interest:

Unreasonable delay in the re-sale of goods disentitles the vendor to the grant of interest from the date of the institution of the suit till the date of realization.

Messrs Ralli Brothers Limted v. *Firm Messrs Bhagarandas Parmeshrim Das*, A.I.R. 1945 Lah. 35.

(2) *Contract Act* (1872), *Ss. 56 and 73-Contract to supply tapestries manufactured to specifications given by vendee for selling them in Australia-Australian Government prohibiting import of such goods-Market having lost vendee informing vendor to cancel order-Sale to clients in Australia held no term of contract-Vendee was liable for damages-Damages at 7½ per cent. held sufficient.*

S had dealings with a merchant in Australia to whom it sold cotton fabrics, described as tapestries made by P, resident in Calicut. In October 1941, the parties, i. e., S and P, entered into correspondence with regard to the making of tapestries by P for S, who made it clear that he intended to sell them in Australia. After some correspondence, terms were fixed and contracts entered into between the parties for the supply, to the specification given by S, of certain qualities of goods. S had taken delivery of many pieces under previous orders and had apparently sold them in Melbourne ; but the Australian Government passed an order prohibiting the import of such goods after 1st April 1942, except under certain conditions. The result was that the market on which S had relied for the sale of the goods purchased from P under the contract was lost. S wrote to P on 28th April 1242 informing P of the circumstances and asking them to cancel their order. As a result of the cancellation of the contract P. ceased to manufacture the goods ordered, but claimed as damages 15 per cent of the contract price, which they alleged were the profits they would have made had it not been for the breach of contract committed by S:

Held, that the Courts should not read into a contract an implied term that the enforceability of the contract was to be dependent upon the ability of the vendee to find customers for the goods. It was not the foundation of the contract that these goods should be re-sold by S to their clients in Australia and hence the contract had not become impossible but could be fulfilled. It would have been foolish of P to have continued with the contract, manufactuoed the goods, and then to have attempted to sell them in the open market ; for tbe goods were made to order to the specifications furnished by S, and there was no guarantee that P would be able to realise even the cost price of manufacture had they made them and attempted to sell them. It was therefore impossible to calculate the damages by any means other than that suggested by P. There was no fixed date of delivery. Damages should be awarded under the circumstances at 7½ per cent. on the net value of the goods:

Samuel Fitz & Co., Ltd ; Calcutta v. *Standard Cotton and Silk Weaving Co., Calicut*, A. I. R. 1945 Mad. 291.

(3) *Contracts-Cross contracts-Similar quantities of bales to be delivered to each other-Goods or price need not be tendered-Party entitled to get difference can claim it without tender of goods or price.*

In the case of cross contracts for delivery of exactly similar quantities of cotton bales there is no necessity for either party to either tender the goods or tender the price. The person who has to get the difference can without going through the farce of tender, claim the difference which is really in his favour.

Karuppaswami Moopanar v. *Chottabhai Janerbhai & Co.* A. I. R. 1945 Mad. 59.

(4) *Breach-Contract of sale of goods-Measure of damages.*

In the case of a breach of a contract of sale of goods, the measure of damages is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract.

Jivraj Khimji v. *Chainkaran*, A. I. R. 1944 Nag. 279.

(5) *Earnest money-Return-Right to-Breach of contract by party claiming return.*

Where there is a stipulation that earnest money shall be forfeited and there is a breach of contract by the party who claims the return of the earnest money his claim is not entertainable because the opposite party has the right under the contract between the parties to retain it in case of breach by the person claiming it,

Khuda i. Tala v. *Hamida Khatoon*, 1944 A. L. J. 427.

(6) *Hire purchaser-Essentials.*

An essential feature of a contract for hire purchase is the option given to the prospective purchaser to terminate the contract and return the chattel. Where such option is absent, the contract is not one of hire-purchase.

Subbarayalu v. *Annamalai Chettiar*, *A. I. R.* 1944 Mad. 526.

(7) *Railway-Contract for carriage of goods-Charging by mistake of concession rate which had been cancelled-Right of railway to collect before delivery the amount of the difference in rates-Condition on the back of forwarding note (not really consignor) enabling the railway to collect the amount-How far binding on consignor.*

The forwarding note in the prescribed form signed by the consignor and addressed to the South Indian Railway Company stated "Please receive the undermentioned goods and forward by goods train to-on-Railway as consigned below and subject to the following conditions which are accepted by me, namely .." The consignor was required to sign a statement "I do hereby certify that I have satisfied myself that the description, marks, value and weight or quantity of goods consigned by me have been correctly entered on this forwarding note and I agree to be bound by the conditions printed above and at the back of this forwarding note: and on the railway receipt granted for these goods." On the back of the forwarding note were conditions No. 8 of which read as follows: "Goods booked to stations on the South Indian Railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the Railway Company's Goods Tariff, and goods booked to or over

a foreign railway are subject to the rules and regulations and to wharfage and other charges in force on such railway." Rule 15 of the rules published in the Goods Tariff of the South Indian Railway states that the weight, description and classification of goods, and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of "any other" errors at the place of destination and of collecting any amount that may have been omitted or undercharged. The rules of the Ceylon Railway contain similar provisions. Where in respect of a consignment of some waggons of rice to Galle in Ceylon consigned from stations on the South Indian Railway, by mistake a concession rate which had been cancelled was charged; the consignor must be deemed to have had notice of the cancellation of the concession rate and the reimposition of the ordinary rate. The railway had under the rules and conditions in the contract contained in the forwarding note a right to collect the difference between the concession rate and the ordinary rate and where the consignee was compelled to pay the difference before delivery of the goods a suit for the refund of the amount is not maintainable. Failure of the consignor to read the conditions on the back of the forwarding note would not help him. Further the authority of the booking clerk is restricted and he cannot lawfully accept a rate outside the tariff.

Sheik Dawood Rowther v. *South Indian Railway Co. Ltd.*, A. I. R. 1944 Mad. 444.

(8) *Construction-Contract subject to rules and bye-laws of East India Cotton Association.*

A clause in an agreement for the purchase and sale of cotton provided that no suit in regard to any matter arising out of the transactions should be instituted in any court save the High Court of Bombay or the Court of Small Causes at Bombay. The transactions under the contract were to be subject to the rules and regulations of the East India Cotton Association, under which the disputes had to be referred to arbitration.

Held, that the clause referring to the institution of "suits" had no operation unless a suit was filed, in which case the Court was defined and that the clause in question did not oust the provision requiring arbitration under the rules and bye-laws of the East India Cotton Association or affect reference of disputes to arbitration.

Patel Bros. v. *Shree Meenakshi Mills, Ltd*, A.I.R. 1942 Bom. 239.

(9) *Construction-Sale of goods-"Delivery-November, December February, 1933"-Meaning of*

Where a term in a contract of sale provides for "Delivery.-November, December, January, February, 1933" it means that delivery has to be made in equal instalments in each of the four months, or at any rate some quantity has to be delivered in each of the four months. It cannot be construed as meaning that it is at the option of the seller or supplier to deliver at any time before the end of February, 1933, or that it is not obligatory on the seller to make deliveries in each of the four months.

Vankiah and Bros. v. *Gupta*, 20 Mys.L.J.194.

(10) *Contract by correspondence-Formal execution of document contemplated - parties acting upon contract-Execution of formal doucment-If necessary.*

Where the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is binding contract and the reference to the mere formal document may be ignored. The conduct of the parties in acting upon the contract before the formal agreement was drawn up is the clearest evidence of this fact.

Gujjarmal v. *Governor-General of India*, A. I. R. 1942 Pesh. 33.

(11) *Sale and purchase of goods-Provision declaring indent null and void if goods not supplied for any cause whatsoever-Effect of.*

One of the conditions of a contract of sale and purchase between the plaintiff and the defendants was as follows :- "It is understood that this indent is null and void in case the goods are not shipped or you cannot supply for any cause *whatsoever* without assigning any reason." Earlier in the condition reference was made to the defendants or their agents being exempted from responsibility for non-delivery of the goods by the makers or loss or inconvenience for reasons mentioned, and the delivery of the goods was subject to storm, fire and similar provisions.

Held, that the words "any cause whatsoever, in the first sentence should not be read by the *ejusdem generis* rule-and that they excused the defendants from all liability.

Kedhakinen Mull v. *Sohan Lal Mohanlal*, 4) C.W.N.86.

(12) *Sale and purchase of goods-provision declaring null and void if goods are not supplied for any cause whatsoever-Effect of validity.*

One of the clauses of a contract was as follows:-" You or your agents are not to be held responsible for non-delivery of the goods by the makers or any loss or inconvenience that may originate by fulfilment of these goods. Delivery of the above goods is subject to storms, fire, war, tempest, flood, drought, strikes, lock-outs, bankruptcy' accidents and such other causes beyond human control. It is also understood that this indent is null and void in case goods are not shipped or you do not supply for any cause *whatsoever* without assigning any reason."

Held, (i) that the inclusion of the word '*whatsoever*' in the last paragraph excluded the application of the rule of '*ejusdem generis*' when interpreting the meaning of the sentence in which the word appeared, that the provision in the last paragraph was intended and it did intend to cover every possible reason for non-supply and non-

shipment, and in the event of the defendant failing to supply the goods, then the indent was to be null and void and that consequently the defendants could not be held responsible for loss which might be occasioned to the plaintiff through failing to obtain delivery of the goods specified in the indent; (ii) that there was nothing which prevented the parties to a contract including a term in it to the effect that the party who was obliged to deliver the goods should not be liable for non-delivery.

Radhakissen Mull v. *Maganlal Bros.*, 47 C. W. N. 89.

(13) *Sale and purchase of goods-Request to supply or instruct friends abroad to buy-If constitutes contract.*

The relevant words of a letter signed by the plaintiff and addressed to the defendants were as follows:- "We hereby request you to supply or to instruct your friends abroad to buy for and to ship, if possible, on our account and risk" and then the contract goods were set out with the terms. The defendants wrote to the plaintiff as follows:- "We beg to inform you without any engagement on our part that your under-mentioned valued indent has been placed with thanks."

Held, that the contract between the parties was one of sale and purchase, and that the defendants did not merely act as correspondents passing on the plaintiff's order to persons abroad.

Radhakissen Mull v. *Sohanlal Mohanlal*, 47 C. W. N. 86.

(14) **Damages**—*Section 51 of the Indian Contract Act, 1872.*

Readiness and willingness to perform includes ability to perfrom. In a suit by the buyer for damages for breach of a contract for sale of goods it is incumbent upon him to satisfy the court that he was ready and willing with the money or had the capacity to pay for the goods or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase-money. Therefore where the buyer is proved to have been in a state of acute financial embarrassent on the date of delivery and could not have paid for the goods brought if the seller had delivered them to him, the buyer cannot be said to have been ready and willing to carry out his part of the contract and therefore the seller is absolved from his liability under the contract.

Jagannath Sagarmal v. *J. J. Aaron and Co.*, A. I. R. 1940 Rang. 284.

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THE

INDIAN SALE OF GOODS ACT, 1930[1]

(Act No. III OF 1930)

[PASSED BY THE INDIAN LEGISLATURE].

(Received the assent of the Governor-General on the 15th March, 1930).

An Act to define and amend the law relating to the Sale of Goods.

Whereas it is expedient to define and amend the law relating to the sale of goods; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called the Indian Sale of Goods Act, 1930.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the first day of July, 1930.

To define and amend the law relating to the sale of goods—history of the Act—previous law.

Law before the passing of the Indian Contract Act, 1872.

Before the passing of the Indian Contract Act, 1872, Chapter VII of which contained the law relating to the sale of goods or moveables, the law on this subject was not only not uniform throughout British India but was also, outside the limits of the original jurisdiction of the High Courts, extremely uncertain in its application. Within the limits of the Presidency towns, the rules of English law, including those in the Statute of Frauds, were applied, while in the mofussil it was doubtful whether the Statute of Frauds was applicable, and as observed by the Indian Law Commissioners in their second Report, the Judge was to a great extent without the guidance of any positive law beyond the rule that his decision should be such as be deemed to be in accordance with "justice, equity and good conscience." To remedy this unsatisfactory state of affairs, the Indian Law Commissioners framed in their second Report, dated the 28th July, 1866, a set of rules relating to the general law of contracts including

1 For Statement of Objects and Reasons and for Report of Special Committee, see Gazette of India, 1929, Pt. V., p. 163;, for Report of Select Committee, see ibid, 1930, Pt. V. p. 1.

therein provisions relating to the sale of moveables. The draft of the law Commissioners underwent several changes at the hands of the Law Members, Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But as stated by Sir James Stephen himself while presenting the Report of the Select Committee on the Indian Contract Bill, the Chapter on the sale of goods, except in regard to the rule as to market overt, represented generally the English law on the subject as it then stood.[1]

The rules of English Law relating to the sale of goods had grown up mainly out of judicial decisions. Along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. They were, however, largely dominated by the provisions of the Statute of Frauds which was passed in the reign of Charles the Second. The Law Commissioners, as well those who were ultimately responsible for framing the Indian Contract Act, at once realized that the provisions of the Statute of Frauds, although followed in the Presidency towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of that statute in consequence of its vague language."[2]

Chapter VII of the Indian Contract Act, 1872.

In 1870, various branches of law were being codified in British India. The main object in view was, in the words of Sir James Stephen, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Native Government Servants without extrinsic help from the English law libraries." The Indian Contract Act. 1872, thus codified the branch of law relating to contract, and Chapter VII of that Act (sections 76 to 123) specifically related to sale of goods, and was admittedly based on the English law relating to that subject. Prior to the passing of the Sale of Goods Act, 1893 (56 & 57 Vict. C. 71), the English law as to the sale of goods was governed almost entirely by the common law, including the law merchant. There were, however, a very few limited statutory enactments affecting the subject and restricting the freedom of contract.[3] Thus the principles of Chapter VII of the Indian Contract Act, 1872, were based mainly on the English common law on the subject.

Fresh codification of law considered necessary.

Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time revealed defects the removal of which became necessary in order to keep the law abreast of the developments of modern business relations. As observed by the Special Committee, "the law relating to the sale of goods appertains mainly to mercantile transactions. There can be no doubt that

1 Report of the Special Committee, para 3. (Appendix C.)

2 Report of the Special Committee, para. 4. (Appendix C)

3 See *e.g.*, Stat (1603—4) Jac. 1 C. 21; Statute of Frauds, 1677) 29 Car. 2, C. 3) sections 15, 16, (sections 16, 17. Ruff) Statute of Frauds Amendment Act, 1828 (9 Geo. 4 C. 14) section 7; Mercantile Law Amendment Act, 1856 (19 and 20 Vict. C. 97), sections 1, 2 All these enactments were repealed by the Sale of Goods Act, 1893.

during the last half-century conditions in this country relating to trade and business have undergone material changes. Methods of business have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognition to new principles, and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new relations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Contract Act is not exhaustive, and to import therein analogies from the decisions of the English Courts[1]."

English Sale of Goods Act, 1893 as basis of Indian Sale of Goods Act, 1930.

The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract Act had itself since 1872 undergone drastic changes, and was finally codified in 1893 (56 & 57, Vict. C. 71), which discards many of the old common law rules upon which Chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice. As again observed by the Special committee, this Act has stood the test of nearly thirty-five years of practical application, and in the words of Lord Parker in *re Parchim* (1918) A. C. 157 at pages 160-161, "is a very successful and correct codification of this branch of the mercantile law[2]." That this Act is strikingly complete and its provisions are of universal suitability is further clear from the fact that most of the Colonies and Overseas Dominions have adopted and re-enacted this Act with only such small variations as have been found necessary to adapt its provisions to local circumstances[3]. Even the Uniform Sales Act, passed in 1906 in the United States of America and adopted in twenty out of fifty-three States and territories, is based very largely on the English Act.

The Indian Sale of Goods Bill which ultimately resulted in the Indian Sale of Goods Act, 1930, was consequently also based on the English Sale of Goods Act, 1893. "In mercantile transactions a conflict of laws should, as far as possible, be avoided. Uniformity of law in various countries, particularly in those which have business or trade dealings with one another is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provisions of the English Sale of Goods Act so *far as they are suitable to Indian conditions* as the basis for the present Bill, and thus to make the Indian Law relating to the sale of goods as nearly as possible uniform with the law in force in other parts of the British Empire[4]".

Indian Sale of Goods Act, 1930.

The scheme followed in codifying the law for India has been thus explained by the Special Committee : "In adopting the provisions of the English Act we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt, is not suitable to Indian conditions, the rule has been rejected. We have moreover carefully scrutinized the provisions of the English Act in the light of the decisions of English Courts since 1839, and where their decisions have shown the provisions of the English Act to be

1 Report of the Special Committee, para. 6 (Appendix C).
2 Report of the Special Committee, para. 9 (Appendix C).
3 See Appendix D.
4 Report of the Special Committee, para. 10 (Appendix C).

defective and ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act which we consider necessary or useful to meet special conditions existing in India[1]."

The following observations of the Select Committee on the Bill may also be found instructive :—

"After considering the opinions received, we find ourselves in agreement with almost all the provisions contained in the Bill. We entirely approve of the scheme followed in the Bill in adopting as far as possible the provisions of the English Sale of Goods Act, 1893, in arrangement as well as wording. As pointed out in paragraph 9 of the Committee's report referred to above (Report of the Special Committee), that Act has met with uniform approval and has stood the test for more than a third of a century. It has been adopted in most of the Overseas Dominions and Colonies and also in the United States of America. We feel that in commercial transactions there ought to be as far as possible uniformity of law in countries which have dealings with one another[2]."

By section 292 of the Government of India Act, 1935, the Indian Sale of Goods Act, 1930, continues in force in British India until altered or repealed or amended by a competent legislature or other competent authority; subject, however, to such adaptations as may be prescribed by an order in Council as laid down in section 293 of the said Act.

Scope of the Act—principles of construction

The preamble to the Indian Contract Act, 1872, states that that Act defines and amends *certain parts* of the law relating to contracts. The preamble to the Indian Sale of Goods Act, 1930, on the other hand, states that this Act defines and amends the law relating to the sale of of goods. It would therefore appear that the present Act is intended to deal exhaustively with the law as to sale of goods, except to the extent to which its provisions are made to depend on other enactments for the time being in force. Thus section 66 of the Act saves the provisions of such enactments as the Indian Merchant Shipping Act, 1923, and the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods. Again, section 3 of the Act states that "the unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods."

The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters, but there is nothing to show that the legislature intended to deal exhaustively with any particular Chapter or sub-division of the law relating to contracts[3]. In *Ram Das* v. *Amar Chand*

1 Report of the Special Committee, para. 12 (Appendix C).

2 Report of the Select Committee. (Appendix E).

3 Irrawaddy Flotilla Co., v. Bhagwandas, 18 Cal. 620, 628, cited in Jwaladutt R. Pillani v. Bansilal Motilal, 56 I A., (1929) at p. 178. "The Act, so far as it goes, is exhaustive and imperative"; Promotha v. Prodymno, 26 C. W. N. 772; Gajanan Moreshwar v. Moreshwar Madan, 1942 Bom. 302.

& Co.:[1] the point for decision was whether a railway receipt could be termed as "instrument of title" within the meaning of section 103 of the Indian Contract Act, and it was argued that the Act having been passed at a time, when the English Law did not recognize railway receipts as instruments of title, the Legislature could not possibly have intended to include railway receipts in the term. "instrument of title". The Judicial Committee said: —

"The Indian Contract Act is an *amending* as well as a *consolidating* Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law...Their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform."

Chapter VII of the Indian Contract Act, 1872, relating to "sale of goods" is repealed by section 65 of the Indian Sale of Goods Act, 1930. The Indian Sale of Goods Act is an amending as well as a consolidating Act. The English Act, on which the present Indian Act is based, is also a codifying Act, and the rules for construing such an Act are thus stated by Lord Herschell in *Bank of England* v. *Vogliano*:[2] "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear interpretation in conformity with this view......I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relating to such instruments, the same interpretation might well be put upon them in the Code. I give these as examples merely; they, of course, do not exhaust the category. What I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground".

As to repealed provisions, it has been said that it is hazardous to refer to such as have been absolutely repealed to ascertain what the Legislature meant to enact in their rooms and stead, and if the words of the new statute are capable of being interpreted without such foreign aid, it is not proper to examine the enactments of statutes no longer existing for the purpose of imposing upon those words a meaning which taken by themselves they do not bear.[3] As observed by Jessel M.R. in *Ex Parte Blaiberg, In Toomer*:[4] "I think the

1 (1916). 43 I.A. 164, 170=40 Bom. 630, 636=35 I. C. 954; see also Hari Lal v. Pehladrai, (1929) Bom. 260=120 I.C. 337=31 Bom. L.R. 508.

2 (1891) A.C. 107, 144-145; Hem Raj v. Krishan, 1928 Lah. 361; Ganpat v. Sopana, 1928 Bom. 35; Alfred Wilkinson v. Grace Wilkinson 1923 Bom. 321; Satish Chandra v. Ram Dayal, 1921 Cal. 1; Rahimbux v. C.B. of India, 1929 Cal. 497; Raghumul v. Official Assignee, 1924 Cal. 424, Narendra v. Kamalbasini, 23 Cal. 563, 571, 572.

3 Bradlaugh v. Clarke (1883) 8 App. Cas. 354, 380, per Lord Watson.

4 (1883) 23 Ch. D. 254, 258.

proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act". Cozens Hardy M.R. while referring to the English Sale of Goods Act, 1893, said :—"I rather deprecate the citation of earlier decisions. The object and intent of the statute was no doubt simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may, to some extent, have altered the prior Common Law".[1]

The provisions of the repealed Chapter of the Indian Contract Act, 1872, and the construction which they have authoritatively received may, however, be taken into account for certain purposes. When it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended.[2]

Thus, if words have received authoritative interpretation and are repeated without alteration, it may be presumed that the Legislature had adopted that interpretation;[3] for speaking generally, it may be taken that the Legislature uses the same language in the same sense when dealing at different times with the subject. A change of language, therefore, is some indication of a change of intention, but this is by no means a necessary conclusion.[4] Where, however, a limited interpretation has been placed upon the repealed provisions, and the words have been enlarged, it is a legitimate inference that the enlargement was intended by the Legislature[5]; conversely, where the words of the repealing Act appear to be narrower than those of the repealed Act, the change may be presumed to be intentional.

See also notes under sections 3 and 65 of the Act.

English law how far helpful in interpreting the law of sale of goods in India.

As the Indian Sale of Goods Act, 1930, is based primarily on the English Sale of Goods Act, 1893, the decisions of the English courts under the latter Act will be quite relevant as far as applicable to interpret the provisions of the former Act. It was observed by the Special Committee on this point—"The adoption of the English Act on the basis of the present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English courts."[6]

In the case of ***Mollwo March & Co.*** v. ***Court of Wards***[7] their Lordships of the Privy Council held that in the absence of any law

1 Bristol Tramways Co.. v. Fiat Motors (1910) 2 K.B. 831=79 L.J.K.B. 1109. "The statute was passed to declare the law. We are bound by it, and can look to nothing else" - Abbot v. Wolsey (1895) 2 R. 97. See Maxwell on the Interpretation of Statutes, 8th Edition, p. 23.

2 Mansell v. The Queen (1857) 3 E & B. 54, 73.

3 See Holliday & Greenwood, Ltd. v. District Surveyors Association (1914) 2. K.B. 803, 814, 815.

4 Hurlbatt v. Barnett & Co. (1893) 1 Q.B. 77, 78, 79, C.A., per Lord Esher, M. R.

5 Abdur Rahim v. Syed Abu, 55 I A. 96=55 Cal. 519=1928 P. C. 16=108 I. C. 361.

6 Report of the Special Committee, para. 11 (Appendix C).

7 18 W.R. 384, P.C; (1872) L.R. 4 P C. 419.

or well established custom existing in India on the subject of the law of partnership, English law would properly be resorted to in mercantile affairs. for principles and rules to guide the court in this country to a right decision; but that although this is so, it should be observed that in applying these principles and rules, the usages of trade and habit of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind. This remark appears to be equally applicable to other branches of the law than that of partnership.

It has been observed that to construe an Indian Act in the light of cases decided under an English Act differently worded is much likely to cause confusion than to render assistance.[1] The analogous English law should therefore be carefully studied and compared with the Indian law before using English case-law for interpreting the Indian law. Subject to these remarks, where the Indian case-law on the subject is meagre or not forthcoming use of the English case-law on the subject as illustrative of the general principles of the law of sale of goods will be of considerable help.

Conflict of laws.

Some times in commercial transactions between persons residing in different countries, points of dispute arise and it is to be ascertained what is the true rule by which the validity, obligations and interpretation of contracts are to be governed. There are, however, certain principles of universal application, admitted by the whole world; for instance, to make a contract valid it is a universal principle that it should be made by parties capable to contract; that it should be upon a sufficient consideration, that it should be lawful in its nature and that it should in its terms be reasonably certain. But on matters in detail on these points there may be diversity in the positive and customary laws of different countries and nations. Persons capable in one country are incapable by the laws of another : considerations good in one country, are insufficient or invalid in another; the public policy of one country permits or favours certain agreements which are prohibited in another : the forms prescribed by the law in one country to ensure validity and obligation of contract are unknown to another: and the rights acknowledged by one country are not commensurate with those obtaining in another.[2]

Again, a person sometimes contracts in one, is domiciled in another, and is to pay in a third, and the property which is the subject matter of the contract may be situated in a fourth; and each of these countries may have different and even opposite laws affecting the subject matter. What is the position when there is such a conflict of law ? What law is to regulate the contract either to determine the right or the remedies or the defences growing out of it, or the consequences flowing from it ? What law is to interpret its terms and ascertain the nature, character and extent of its stipulations ?[3]

1 See Bai Kokilabai v. Keshavlal Mangal Das & Co.. 1942 Bom. 18=43 Bom. L. R. 985 (F.B.).

2 See Tagore Law Lectures, 1910, on Commercial Law in British India by Mr. C.O. Remfry, Chapter II. p. II.

3 Story, Conflict of Law, S. 232.

The transfer of the property in goods under sales made in foreign countries is in general regulated by the law of the place where the goods are situate at the time of the sale, the rule being that, if personal property be disposed of in a manner binding according to the *lex situs*, that is, the law of the country where it is at the time, the disposition is binding everywhere[1], whether the transfer be by way of sale[2], gift[3], or pledge[4]. *Locus regit actum* is a rule of wide application.

But the construction of a contract of sale, in so far as it creates mutual rights *in personam*, is determined by the proper law of the contract, that is to say, the law which the parties contemplated as law governing the contracts ; *prima facie*, this law is the law of the place where the contract is made, the *lex loci contractus*[5]. When the contract is made in one country, but is to be performed in another, it may be presumed that the law of the place in which it is to be performed is the law which is to be applied[6]. But these are mere presumptions subject to the intention of parties[7], and may be rebutted by the facts of any particular case in which a different intention is either expressed or may be inferred, the *lex contractus*.

Questions as to the admissibility of evidence, the enforceability of the contract by action, and other matters of procedure belong in general to the *lex fori*, that is, the law of the country in which the action is brought[8].

See Appendix F where this subject has been dealt with in detail.

Act not retrospective.

Omnis nova constitutio futuris formam imponere debet, non praeteritis[9]; *prima facie* a new law affects future transactions not the past. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication[10]. S. 66 of the Act clearly shows that it is not retrospective. Its provisions, therefore, do not apply to contracts of sale of goods made before the Act came into force.

1 Halsbury, Laws of England, Vol. XXIX, p. 8; Dicey, Conflict of Laws, 5th Edition pp. 637 & 672; see Cammell v. Sewell (1860), 5 H. & N. 728 Ex. Ch. ; Todd v. Armsur (1882),)9 R. Ct of Sess) 901.

2 Cammell v. Sewell (1860) 5 H. & N. 728, 120 R. R. 769 ; Embiricos v. Anglo Australian Bank (1905), K. B. 677, 683, C. A.

3 Re Karvine's Trust (1921) 1 Ch. 343, 348.

4 City Bank v. Barrow (1880) 5 App. Cas. 664, 677.

5 Halsbury, Laws of England, Vol. XXIX, 2nd Ed. p. 8 ; Dicey, Conflict of Laws, 5th Ep. p. 637; Re Missiouri Steamship Co. (1889), 42 Ch. D. 321 at p. 328, C. A., Cf. Daulton & Co. v. Corporation of Medias (1920) W. N. p. 221 (goods to be made in England and delivered in India).

6 Dicey, Conflict of Laws, 5th Ed. p. 645, Cox v. The Governors of Bishop Cotton's School, (1874) P. R. No. 85.

7 Abdul Aziz v. Appayasami (1903) 27 Mad. 131 ; 18 C. W. N. 186 ; 6 Bom. L. R. 7 (P. C.)citing Lloyd v. Guibert 1865) 1 Q. B. 115 ; Cf. Benaim v. Debono (1924) A. C. 514.

8 Halsbury, Laws of England, Vol. XXIX, 2nd Ed, p. 8 ; Dicey, Conflict of Laws, 5th Ed pp. 670 to 684, Leraux v. Brown (1852) 138 E. R. 1119 ; 92 R. R. 889.

9 2 Inst. 292

10 Maxwell ; Interpretation of Statutes; see also lalmohan v. Jogenndra, (1887) 19 Cal 636 ; Sham Singh v. Vir Bhan 1942 lah. 102 F. B. ; Jagmohan Singh v. Ramanandan Prasad Narayan Singh; 1941 Pat. 253 ; Bhai Kirpa Singh v. Rasaldar Ajaipal Singh, 1928 lah. 627 (F.B.)

Chief differences between the Act and Chapter VII of the the Indian Contract Act.

(1) The present Act embodies the principles that the question whether a contract for the sale of goods does or does not pass the property in the goods from the seller to the buyer must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act were vague and conflicting on this point.

"The Bill codifies the rules by which that intention may be ascertained, but the operation of these rules will be displaced by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following the principle, we have borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulations. Sale after all, is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either formed no intention or failed to express it.[1]

(2) The distinction between a sale and an agreement to sell, which was not clear in Chapter VII of the Indian Contract Act has been clearly brought out. This distinction is very necessary to determine the rights and liabilities of the parties to the contract.

(3) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.

(4) In the Indian Contract Act the word "warranty" had been used in a very vague sense. In some provisions it denoted a condition which would enable a party aggrieved by its breach to repudiate the contract, while in others it enabled him to claim damages only. In the Act this ambiguity has been removed.

(5) Section 108 of the Indian Contract was obscure in phraseology and this led to conflict in decisions. Sections 27 to 30 of the Act aim at removing this obscurity and simplifying the law on the subject.

(6) The rules relating to delivery to carriers, stoppage in transit and auction sales, have been elaborated in the Act.

(7) The Act is without illustrations ; and the courts are left to construe sections as they stand.

Extent of the Act.

The Act extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

The expression "British India" is not defined in the Act and therefore the definition thereof in the General Clauses Act, 1897 (Act No. X of 1897) will apply. It is defined in that Act as follows :—

[2]["British India" shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935,[3] all

1 Report of the Special Committee (Appendix C).

2 Substituted for the original clause (7) by the Government of India (Adaptation of Indian Laws Order, 1937)

3 *i. e.*, the 1st April, 1937.

territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or Officer sub-ordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar.

The reference to Berar was necessitated by the fact that under section 47 of the Government of India Act, Berar and the Central Provinces shall notwithstanding the sovereignty of His Exalted Highness the Nizam be deemed to be one Governor's province by the name of the Central Provinces and Berar.

Aden and British Burma were governed by His Majesty through Governors or other officers sub-ordinate to the Governor-General of India and were thus within British India[1]. As regards Aden, it has now been provided by section 288 of the Government of India Act, 1935 (25 & 26 Geo. V. C. 12), that on such date as His majesty may, by Order in Council appoint, Aden shall cease to be a part of British India. By virtue of an Order in Council issued under that section, Aden has ceased to be part of British India from 1st April 1937. Burma has also ceased to be part of India with effect from that date—*vide* section 46 (2) of the Government of India Act, 1935.

Governors' Provinces.

Section 46 of the Government of India Act, 1935, defines Governors' Provinces as follows :—

'46. (1) Subject to the provisions of the next succeeding section with respect to Berar, the following shall be Governors' provinces, that is to say, Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orrisa, Sind, and such other Governors' Provinces, as may be created under this Act.

(2) Burma shall cease to be part of India.

(3) In this Act the expression "Province" means, unless the context otherwise requires, a Governor's Province and 'Provincial' shall be construed accordingly".

As to Berar, section 47 of the Government of India Act, 1935, provides as follows :—

Provisions as to Berar.

Whereas certain territory (in this Act referred to as 'Berar') under the sovereignty of His Exalted Highness the Nizam of Hyderabad, but is at the date of the passing of this Act, by virtue of certain agreements subsisting between His Majesty and His Exalted Highness, administered together with the Central Provinces ;

And whereas it is in contemplation that an agreement shall be concluded between His Majesty and His Exalted Highness whereby, notwithstanding the continuance of the sovereignty of His Exalted Highness over Berar, the Central Provinces and Berar may, be governed together as one Governor's Province under this Act by the name of the Central Provinces and Berar.

1. For Aden, see Abdulla Mohammad v. A. M. Zulaikhi, A. I. R. 1924 Bom. 290 (293)=84 I. C. 796. See also Aden Laws Regulation of 1891, section 2. For Burma, see Aga Mohammad Hamadani v. Cohen, (1886) 13 Cal. 221(223).

Now, therefore,—

(1) While any such agreement is in force—

(*a*) Berar and the Central Provinces shall, notwithstanding the continuance of the sovereignty of His Exalted Highness, be deemed to be one Governor's Province by the name of the Central Provinces and Berar.

(*b*) And reference in this Act or in any other Act to British India shall be construed as reference to British India and Berar, and any reference in this Act to subjects of His Majesty shall, except for the purposes of any oath of allegiance be deemed to include a reference to Berari subjects of His Exalted Highness;

(*c*) Any provision made under this Act with respect to the qualifications of the voters for the Provincial Legislature of the Central Provinces and Berar, or the voters for the Council of State, shall be such as to give effect to any provisions with respect to these matters contained in the agreement;

(2) If no such agreement is concluded or if such an agreement is concluded but subsequently ceases to have effect, references in this Act to the Central Provinces and Berar shall be construed as references to the Central Provinces and His Majesty in Council may make such consequential modifications in the provisions of this Act relating to the Central Provinces as he thinks proper."

Section 94 of the Government of India Act, 1935, runs as follows:— Chief Commissioners' Provinces.

"94. (1) The following shall be the Chief Commissioners' Provinces, that is to say, the heretofore existing Chief Commissioners' Provinces of British Baluchistan, Delhi, Ajmere-Marwara, Coorg and the Andaman and Nicobar islands, the area known as Panth Piploda, and such other Chief Commissioners' Provinces as may be created under this Act.

(2) Aden shall cease to be part of India.

(3) A Chief Commissioner's Province shall be administered by the Governor-General acting, to such extent as he thinks fit, through a Chief Commissioner to be appointed by him in his discretion."

The Scheduled Districts.

The phrase "the whole of British India" included the Scheduled Districts. A list of Scheduled Districts is given in Schedule I to Scheduled Districts Act XIV of 1874.

In respect of the Scheduled Districts, the Government of India (Adaptation of Indian Laws) Order, 1937 provides as follows:—

"This Act [The Schedule Districts Act, 1874 (XIV of 1874)] shall cease to have effect, without prejudice to the continuing validity of any notification, appointment, regulation, direction or determination made thereunder and in force immediately before the commencement of Part III of the Government of India Act, 1935:

Provided that where immediately before the first day of April, 1937, any enactment is, by virtue of any notification made under this Act, in force in any area in British India, either with or without restrictions or modifications, the Central Government, in relation to,

matters enumerated in List I of the seventh Schedule to the Government of India Act, 1935, and Provincial Government, in relation to other matters, may, within six months from the said date, by notification in the Official Gazette, declare that the enactment in question shall have effect in that area subject to such modifications and adaptations specified in the notifiation as the Government in question may deem necessary or expedient to bring it into accord with the Government of India Act, 1935."

Territories which do not fall in the definition of British India.

The following territories do not fall within the scope of the definition of British India—

1. Native States of India.[1]

2. Lands ceded by Native Princes to the British Government not for limited sovereignty but for *limited* purposes[2] such as the establishment of a civil station[3] or for railway administration[4].

Where full *sovereignty* has been ceded or a new territory has been acquired, the territory will of course thereby become part of British India.[5]

3. Territories specially excluded from the term "British India" by legitimate enactment. Thus Singapore is not part of British India.[6]

Definitions

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "buyer" means a person who buys or agrees to buy goods;

(2) "delivery" means voluntary transfer of possession from one person to another;

(3) goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them;

(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order

1 Rajah of Faridkot v. Bir Singh=191 P. R. 1888 (Reversed by Privy Council on another point); Ratan Mahanti v. Khato Sahoo=29 Cal. 400; Hem Chand v. Azam Sakar Lal=33 I. A. 1 (P. C.)=33 Cal. 219; Empress v. Keshub=9 Cal. 985.

2 Emperor v. Chiman Lal=37 Bom. 152 =17 I. C. 534; Babu v. Parbati=6 I. C. 429 (Berars); Zubeda Begum v. Kommanna Kanniah=A. I. R. 1925 Mad. 1100=88 I. C. 430 (Agency Tracts of Vizagapattam).

3 Emperor v. Chuni Lal=17 I. C. 534=37 Bom. 152 (Cantonment of Wadhwan); Queen Empress v. Abdul =10 Bom. 186 (Rajkot); Hosai Ali v. Abid Ali (1893) 21 Cal. 177 (Secunderabad).

4 Yusaf Uddin v. Queen Empress= (1897) 2 C. W. N. 1.

5 Jalbhai Ardeshir Shet v. Louis Manuel =(1895) 19 Bom. 680 (686).

6 See Straits Settlements Act, 1866, section 1.

for the delivery of goods and any other document used in the ordinary course of business as proof to the possession or control of goods, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;

(5) "fault" means wrongful act or default ;

(6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;

(7) "goods" means every kind of moveable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;

(8) a person is said to be "insolvent" who has ceased to pay his debt in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;

(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods ;

(10) "price" means the money consideration for a sale of goods ;

(11) "property" means the general property in goods, and not merely a special property ;

(12) "quality of goods" includes their state or condition ;

(13) "seller" means a person who sells or agrees to sell goods ;

(14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made ; and

(15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

Definitions.

All the clauses of this section with the exception of clause (10) have been adopted from section 62 of the English Sale of Goods Act, 1893, with certain necessary modifications. Clause (10) is taken from S. I (1) of that Act. The definition of 'mercantile agent' has been

taken from the English Factors Act. 1889, with a slight modification. Similarly, the definition of "document of title" has been adopted from the English Factors Act, 1889, with some additions. Of the other terms defined in section 62 of the English Act, the term 'warranty' has been defined in section 12 (3) of this Act.

Of the terms defined here the Indian Contract Act, defined only those defined in clauses 7 & 8 i. e. "goods" and "insolvent." Sub-section (15) of section 2 of the Indian Sale of Goods Act states that 'expressions used but not defined in this Act and defined in the Indian Contract, 1872, have the meanings assigned to them in that Act'.

The opening words of the section "unless there is anything repugnant in the subject or context" must also be kept in view in interpreting the terms defined for the purposes of this Act. Thus in S. 24 of the Act, the context shows, that the term "buyer" is there used in the sense of a person having merely an option to buy[1].

Interpretation clause.

An interpretaion clause enacts that certain words found in the Act are to be understood in a specified sense and to include things which but for such a clause they would not normally include. It should be used only for the purpose of interpreting words which are ambiguous or equivocal but not to disturb the meaning of plain words[2]. It only applies to the Act where it finds a place but cannot apply to statutes prior or subsequent. According to Craies, another important rule with regard to the effect of an interpretation clause is. that an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.[3] Lord Cottenham G. observed in *Attorney General* v. *Corporation of Worcester*[4] : "The object of these Acts being framed with interpretation clause is by the means and through the agency of the interpretation clause to avoid the necessity of frequent repetition in describing all the subject-matter to which the Act was intended to apply. It uses, therefore an expression, and then, by the interpretation clause, declares that that expression shall have certain meanings other than the ordinary meaning of the word used and the way to apply that interpretation clause is. when you find the word used in other enactments, to follow the direction of the interpretation clause, and, according to the subject-matter to send it as if it contained the other words which by the interpretation clause it is meant to include."

Where a word or phrase is defined in an Act to have a particular meaning that meaning alone should be given to it notwithstanding it may bear a different meaning in ordinary legal parlance.[5]

It is also an elementary rule of construction that a word must be given the same meaning wherever it occurs in the same enactment

1 See Helby v. Mathews. (1895) A. C. 471=64 L. J. Q. B. 465.
2 Beal's Cardinal Rules of Interpretation. 3rd Edn.; R. v. Pearce, 5 Q. B. D. at p. 389.
3 Craies on Statute Law, 4th Edn.: (1936) at p. 195; See also Pratap Singh v Gulzari Lal, 1942 All. 50 (F. B.)
4 15 L. J. Ch. at p. 399.
5 Dial Singh v. Gurdwara Sri Akal Takht 1928 Lah. 325=9 Lah. 649.

and a *fortiori* in the same section of an enactment, unless the context forbids it.[1]

Distinction between "include" and "mean"

In *R* v. *Kershaw Erle J.*[2] points out the distinction, between the words 'include', and 'mean' in the interpretation section, the former having an extending and the latter an excluding significance. When in an interpretation clause it is stated that certain term *includes* so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning will not include.[3] When the definition is intended to be exhaustive the legislature as a whole uses the word 'means' and not the word 'includes'[4]. 'Means' is thus used in the sense of definition or exhaustive definition while 'include' is used by way of extension.[5] It has, however, been observed that an interpretation clause which extends the meaning of a word does not take away its ordinary meaning, nor does it follow that the word is in every section of the statute to have such extended meaning irrespective of the context.[6]

(1) "Buyer and Seller"

Buyer and seller.[7]

The essence of sale is the transfer of the property in a thing from one person to another for a price. A sale, therefore, necessarily involves the existence of two persons, the seller and the buyer. Hence it has been said that if a man purchases his own goods there is no sale. *Suae rei emptio non valet, sive sciens sive ignorans emerit.*[8]

"Buyer" means a person who buys or agrees to buy goods. "Seller" similarly means a person who sells or agrees to sell goods.[9] This is consistent with section 4 of the Act according to which a contract of sals of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

Consent to buy and sell necessary.

There must be a consent to buy as well as consent to sell. A person who has merely an option to sell or buy is not a seller or buyer within the meaning of the definition. Thus, where under a hire purchase agreement the hirer was under no legal obligation to buy the goods, such an agreement was not a contract of sale, but one of hire, with in addition, an option of purchase, and therefore the hirer had not "agreed to buy goods" within the meaning of section 9 of the English Factors Act. 1889, and is therefore not a buyer.[10] On

1 Ganpat Kinushet Sonar v Vithal Bhikan, 45 Bom. L. R. 976; See also Shiv Nath v. Puran Mal 1942 All, 16 wherein Iqbal Ahmad C. J. observed that the legislature is to be deemed to have used a particular word in an enactment in one and the same sense unless the contrary intention appears from the context. Also Namdeo v. Keshoo I. L. R. 1937 Nag. 469.

2 6 E & B. 1007=26 L.J.M.C. 23=20 J.P. 741.

3 Official Assignee Bombay v. Firm of Chandu Lal Chiman Lal, 76 I.C. 657.

4 Emperor v. Ram Sarup, 1938 Oudh 80=172 I.C. 530.

5 See R v. Kershaw, (1856), 6 El. & Bl. 999; R. v. Hermann, (1879) 4 Q. B. K. 284.

6 See Robinson v. Barton=Eccls Local Board (1883), 8 Appl. Cas. 798.

7 Helby v. Mathews=(1895) A. C. 471; Manders v. Williams (1849) 4 Ex. 339, 80 R. R. 588.

8 Chalmers Sale of Goods Act, 11th Ed. p. 3; 3 Bl. Com. 450; Scotson v. Pegg (1861), 6 H. & N. 295, 298. An option to buy must be distinguished from a conditional agreement to buy.

9 Sub-sections (1) and (13).

10 The definitions of "buyer" and "seller" in this Act are the same as in section 62 of the English Act.

the other hand, there may be a contract by which in return for the payment of a deposit and a promise to pay the balance by certain instalments by the so-called "hirer," the owner agrees to give the hirer possession of the goods and promises to transfer the property in the goods to the hirer when all instalments have been paid. This type of agreement contains no option to purchase and the so-called hirer has no right to return the goods to the owner. It is an agreement under which the so-called hirer promises to pay each instalment when it falls due; it is, therefore an agreement to buy, and as such is within the Factors Act, 1889, and the Sale of Goods Act, 1893 and the hirer is a "buyer."[1] An agreement of hirepurchase in its true sense is essentially different from an "agreement to sell", as will be found explained under section 4.

Buyer and seller must be different persons, but where one person has *by law* the right to sell another person's goods, that other person may purchase his own goods if allowed to do so under the law. Thus under the English law it has been held that one co-owner may sell to another, a partner may sell to his firm, and the firm may sell to a partner, and there are clearly certain *quasi exceptions* to the rule; for instance, when a man's goods are sold under an execution or distress he may himself become the purchaser. So, too, under that law a bankrupt may buy back his own goods from his trustee, "though the trustee, the auctioneer, or any one having a fiduciary character, is precluded from becoming a purchaser by the general policy of the law which prohibits an agent from selling to himself."[2] At common law there could be no contract of sale between husband and wife, since in contemplation of law husband and wife were regarded as one person before the enactment of the married Women's Property Act, 1882 (45 & 46 Vict. C. 75) while a number of persons may sell to themselves as a company, for a company is a different person in the eye of law.

Section 4 (1) of the Indian Sale of Goods Act, 1930, definitely states that there may be a contract of sale between one part-owner and another. For other cases where a seller may purchase his own goods, reference may be made to the relevant statutes in force in India.

(2) "Delivery."

Delivery : definition.

Delivery as defined by section 2 (2) of the Indian Sale of Goods Act, 1930, means 'voluntary transfer of possession from one person to another'. This is the same as in section 62 of the English Sale of Goods Act, 1893.

The essence of delivery is *voluntary* transfer of possession from one person to another. If B steals goods from A, there is no delivery from A to B, though possession is transferred. When

1 Lee v. Butler, (1893) 2 Q. B 318; Felston Tile Co. Ltd. v. Winget Ltd, v. Winget Ltd. (1936) 3 All. E. R. 473; see also Belsize Motor Supply Co v, Cox, (1914) 1 K. B. 244 (option to buy).

2 Chalmers, Sale of Goods Act, 11th Ed., p. 3. Halsbury, Laws of England, 2nd Ed., Vol. XXIX, pages 13 & 16, Ramsay v. Margrett, (1894) 2 Q. B. 18, C.A.; Kitson v. Hardwick (1872), L. R. 7 Cp. 473; at p. 478; Moore, Nettlefold & Co. v. Singer Manufacturing Co. (1904) 1 K. B. 820 C. A.; 12 Digest 23; Plasycoed Collieries Co. Ltd., v. Partridge, Jones & Co. Ltd., (1912) 2 K. B. 345.

possession is voluntarily transferred from one person to another there is always a delivery, which is either at once absolute or, if it be subject to a condition, absolute on the condition.

Where the buyer takes possession pursuant to the leave of the seller, whether concurrent or antecedent, there is a voluntary transfer of possession. Thus under the English law it has been held that where goods are taken possession of by the buyer under a licence to seize, the transaction is equivalent to a delivery by the seller[1] and should perhaps be regarded as a case of actual delivery.

Sir Frederick Pollock defines delivery as "voluntary dispossession in favour of another" and proceeds to say that "in all cases the essence of delivery is that the deliverer, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he himself held immediately before that act[2].

The Act makes no attempt to define the term "possession". Section 1 (2) of the English Factors Act, 1889, however, defines possession, as follows : —

"A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other peason subject to his control or for him or on his behalf."

The term "possession" is probably too elusive for the purpose of a statutory definition. Its meaning is more or less always relative. For instance, when goods are under the control of an agent or servant, they are for some purposes in the possession of the principal or master, while for other purposes they are in the possession of the agent or servant.

"Custody" again is not the only test of possession although the definition of "pssession" in the English Factors Act, 1889, proceeds on these lines. When goods are in the actual custody of a servant, the master alone is legally in possession of them and the custody of the servant is not regarded by the law as the possession of the servant[3]. And possession may exist without actual custody, as for instance, an owner of goods is said to be in possession of them though they are in the actual custody of a bailee at will, or a carrier[4].

Where possession is ambiguous it must be attributed to the person having the title to the goods[5].

1 Chalmers, Sale of Goods Act, 11th Ed. p. 157; Congreve v. Evetts (1854), 10 Exch. 298, at p. 308. per Parke, B.

2 Pollock and Wright on Possession. pp. 43, 46, see further notes under section 33.

3 See Biddomoye v. Sittaram, (1879) 4 Cal. 497.

4 Gordon v. Harper (1796) 7. R. 9. 4 R. R. 369. Aliter, if they are in the custody of a bailee when the contract of bailment cannot be terminated at the will of the bailer; ibid.

5 French v. Gething (1921) 3 K. B. 380 at p. 390 (gift of furnjture to wife); Seager v, Hukma Kossa (1900 24 Bom. 458 (wife in charge of her husband's articles of jewellery as custodian on his behalf). For a full discussion of the meaning of the term as used in the Indian Contract Act, see Haji Rahim Baksh Ashan Karim v, Central Bank of India (1928) 56 Cal. 367=119 I. C. 23.

Mode of delivery.

Section 33 of the Act prescribes that 'delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect ef putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf,' Thus, parties may in time of war agree that the delivery of a despatch telegram may take the place of a bill of lading[1]. Delivery to a carrier or wharfinger is generally regarded as delivery to the buyer (section 39 of the Act).

Actual or constructive-symbolic

Delivery may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery.. Delivery by attornment may take place in three classes of cases.[2] First, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee.[3] Secondly, the goods may be in possession of the buyer before sale, but after sale he may hold them on his own account.[4] Thirdly, goods may be in the possession of a third person, as bailee for the seller. After sale such third person may attorn to the buyer and continue to hold them as his bailee.[5] When goods are stored in a room or close delivery may be made by handing over its keys to the buyer. Such delivery is known as symbolic delivery. In the words of Sir F. Pollock although keys are not the symbol of the goods but the transaction consists of such a transfer of control in fact as the nature admits and as will practically suffice for causing the new possession to be recognised as such,[6] Another and more genuine example of symbolic possession is the transfer of a bill of lading[7]. While the goods are at sea the owner can deal with them on land only through the instrumentality of the Bill of Lading which represents them. The transfer of the Bill of Lading has the same effect as the delivery of the goods themselves? The term "delivery" includes "symbolic" delivery and is not restricted to the physical transfer of the goods themselves, but covers also transfers of possession of documents of title to goods.[8] Actual delivery is manual transfer of the commodity sold and tbe physical custody of the thing passes from the seller to the buyer. These terms will be found fully explained under section 33.

There is no branch of the law of sale more confusing than that of delivery. The word is unfortunately used in very different senses, and these should be borne in mind.

1. The word delivery is sometimes used with reference to the passing of *the property in* the chattle, sometimes to the change of

1. See Haji Peer Muhammad v. Sakarath (1923) Mad. 103 : 43 M. L. J. 193.
2 Chalmers, p. 156 citing Dublin City Distillery Co. v. Doherty (1914) A. C. 823 at p. 852.
3 Story on Sale 212a. Cf, Cain v. Moon (1896) 2 Q. B. 283, 289; Blundell Leigh v. Attenborough (1921) 3 K. B. 235, C. A. (pledge).
4 Ibid; Elmore v. Stone (1809), 1 Taunt 458; Marvin v. Wallace (1866), 6 E. & B. 726.
5 Pollock on Possession, p. 72, Farina v. Home (1846), 16 M & W. 119, 123.
6 Pollock on Possession, p. 61; Cf. Wrightson v. Mc. Arthur (1921) K. B. 807, (816).
7 Saunders v. Maclean, 11 Q. B. D. 327 (341); Per Kennedy L. J. in Biddell v. E. Clemens (1611) I K, B., p. 257; Per Lord Sumner in The Prinz Adelburt (1917) A. C., p. 589).
8 Chalmers p, 156. See also the Bill of Lading Act, 1856, Sec. 1.

its possession ; in a word, it is used in turn to denote transfer of *title* or transfer of *possession.*

2. Even when "delivery" is used to signify the transfer of *possession*, it is employed both with reference to the *formation* of the contract, and to its *performance.* Under the English law, when questions arise as to the actual" receipt" in a parol contract for the sale of chattels exceeding £ 10 in value the Judges constantly use the word "as the correlative of that "actual receipt". But after the sale has been proven to *exist* by delivery and actual receipt, there may arise a distinct controversy upon the point whether the seller has *performed* his completed bargain by delivery of possession of the bulk.

3. Even when the subject is the seller's delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings of "possession". In general it would be perfectly technical to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the seller. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them. and maintain for term. Yet, if he become insolvent under the English law the seller is said to have retained possession. Again, if the seller has delivered the goods to a carrier for conveyance to the buyer, he is said to have lost his lien, because the goods are in the buyer's possession, the carrier being the buyer's agent ; but if the seller claim to exercise the right of stoppage *in transitu* during the transit, the goods are said to be only in the *constructive*, not in the actual possession of the buyer.[2]

Delivery in the various senses above mentioned will be found discussed in this work.

As to how delivery may be made, see section 33, *post.*

As to the effect of part delivery, see section 34, *post.*

As to the rules of delivery, see section 36, *post.*

As to the effect of delivery of wrong quantity, see section 37, *post.*

As to the instalment deliveries, see section 38, *post.*

As to delivery to carrier, see section 39 *post.*

Effect of transfer of possession

The effect of the transfer of possession differs in different circumstances. A delivery effectual for one purpose may be ineffectual for another purpose, and then it is frequently said that there has been no delivery : for instance, when the seller of goods delivers them to a carrier to convey them to the buyer, it is in general as effectual as a delivery to the buyer himself for the purpose of passing the property and risk (section 23), and in discharge of the seller's duty to deliver (section 39), and to divest his lien [section 49 (1) (*a*)] subject to the qualifications contained in section 37 (2) but it is ineffectual for the purpose of defeating the seller's right of stoppage *in transitu*. To defeat this there must be a further delivery from the carrier to the buyer [section 51 (1)].

1 As e. g., per Parke J., in Dixon v, Yates (1833), 5 B. & Ad. 313, 340.

2 See Benjamin on Sale, pp. 711, 712.

(3) Goods in a "Deliverable State."

According to section 2 (3) of the Act, goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them. This reproduces section 62 (4) of the English Sale of Goods Act, 1893. *Cf.* section 80 of the Indian Contract Act which contains the corresponding expression, "a state in which the buyer is to take them".

The expression deliverable state occurs in sections 20, 21, 22, 23 (1), and 36 (5) of the Act. Blackburn paraphrases "deliverable state" as "that state in which the buyer is to be bound to accept" the goods[1]

It may be observed that the buyer can only take delivery of the goods if all that he requires the seller to do has been done by him. If the goods had to be but in casks, cans or bottles, they must have been so put. As to what is deliverable state depends on the nature of the thing itself, the custom or usage of trade relative to that thing and the course of previous conduct between the parties.

In the nature of things one cannot expect that wheat should be filled in bottles or cakes put in gunnery bags. Everything has its own way of packing which is presumed to be a part of the contract unless there is something to the contrary clearly in the contract. Thus if A ask the seller to give him ten seers of wheat after putting them in bottles of one pound each, there is definite condition in the contract which cannot be fulfilled by the customary mode of packing in gunnery bag inspite of the appropriation. The seller cannot force A to take delivery of the goods as he has not put them in a deliverable state. The wheat will only be in a deliverable state according to the contract when it is duly put in the bottles. As soon as the seller has done so A has no option and can be forced to take delivery, and if he fails to do so he is guilty of a breach.

Then again there may have been previous dealings between the parties which control their present dealings, If the seller of wheat has supplied A wheat in one pound bottles ten times before, he is presumed to know A's requirements, and the condition should be deemed to exist; as it is impliedly consented to by the parties and understood by them to exist independently of the special transaction in question.

If the goods are to be manufactured, produced or acquired they are not in a deliverable state unless and until they are manufactured, produced or acquired. If, according to the contract, the seller is to do something with the goods before the buyer should take delivery of them, they are not in a deliverable state until the seller has done that thing with them[2].

(4) "Document of title to goods."

Document of title to goods ; definition.

The Indian Contract Act used the different phrases, "document showing title," "instrument of title" and "document of title" to goods (sections 102, 103, 108 and 178 of the Indian Contract Act, 1872,

1 Blackburn on Sale, 3rd Ed. (1910), p. 184.
2 Laidler v. Burlinson, 2 M. & W. 602; Brown Brothers v Carron Co. (1898), 6 Sc. L. T. 231; Young v. Mathews L. R. 2 C. P, 127.

sections 102, 103 and 108 since repealed by the Indian Sale of Goods Act, 1930).

In *Ramdas* v. *S. Amer Chand & Co*,,[1], the Judicial Committee, after referring to the expression "document of title to goods" as defined in the Indian Factors Act of 1844 (repealed by the Indian Contract Act, 1872), laid down that whenever any doubt arises as to whether a particular document is a "document showing title," or a "document of title" to goods for the purposes of the Indian Contract Act. the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possession of the document to transfer or receive the goods thereby represented. The question in this case was whether a railway receipt which entitled the endorsee to delivery was an "instrument of title" to goods within the meaning of section 103 of the Indian Contract Act, 1872 (since repealed). It was held that it satisfied the test laid down above, and was a "document showing title" to goods within sections 102 and 108, a "document of title to goods" within section 178, and an "instrument of title" within section 103[2].

"Sections 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844, which, with certain modifications not material for the purposes of this appeal, made the provisions of the English Factors Act, 1842 applicable to British India Both the last mentioned Acts use the expression 'document of title to goods' and define it as including any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize either by endorsement or by delivery, the possession of the document to transfer or receive the goods thereby represented."

Under section 62 of the English Sale of Goods Act, 1893, the expression "document of title to goods" has the same meaning as it has in the Factors Act, 1889. Section 4 (1) of that Act defines. "document of title" as follows :—

The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate; and warrant or order for the delivery, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The definition under the Indian Sale of Goods Act, 1930, is wider than that of the English Factors Act, 1889, in as much as it includes not only wharfingers' certificates (which, however, are covered by the term warehouse-keepers' certificates in the

1 (1916 L. R. 43 I. A. 164, 40 Bom. 630, affirming (1913) 38 Bom. 255.

2 The decision in G. I. P. Railway Co. v. Hanmandas (1860) 14 Bom. 57 that a railway receipt is not an instrument of title is, therefore, no longer good law.

English Act) but also railway receipts."[1] The word '*includes*' shows that the definition is not exhaustive but is only descriptive.

Conditions to be fulfilled by a document of title to goods.

The judgment in *Ramdas Vithaldas* v. *Amar Chand & Co.*[2] makes it clear that the use of the expression "any other document" in the concluding words of the statutory definition of document of title shows that the remaining words of the clause, "used", etc., qualify each of the particular documents mentioned as well as any other document. Therefore a warehouse keeper's certificate, or any similar document, will not be a "document of title" unless it be used "in the ordinary course of business" as representing the goods. If it purports to be a delivery warrant, making the goods deliverable to "A,B or his assigns by endorsement or otherwise", the warrant or certificate then represents the goods, and is used as proof of the possession or control of them. It follows therefore that when it is sought to bring any document within the category of a "document of title "it must be shown that it is used in the ordinary course of business representing the goods.

In *Farina* v. *Home*[3] the wharfinger gave the seller a warrant making the goods deliverable to him or to his assignee by endorsement on payment of rent and charges. The seller forthwith endorsed and sent it to the buyer, who kept it ten months, and refused to pay for the goods or to return the warrant, saying that he had sent it to his solicitor and intended to defend the suit[3] as he had never ordered the goods, adding that they would remain for the present in bond. *Held*, that the warrant was a" document of title" to goods.

On the other hand, where the document is in form only a certificate that the goods are lying at the wharf and ready for delivery, it does not and is not intended to represent the goods ; it does not authorise or purport to authorise the holder to receive them: it is, therefore, not a document of title.

In *Gunn* v. *Bolckow*[4] the defendants had contracted to make and sell to the Aberdare Iron company, for shipment to Russia, iron rails, and delivered to the Aberdare Company, in exchange for their acceptances, wharfingers, certificates in the following form : " I hereby certify that these are lying at the works of Messrs. Bolckow, Vaughan & Co., Limited of Middlesborough......tons of iron rails which are ready for shipment and which have been rolled under contract dated...........between the said company and the Aberdare Iron Company.—W. Rai, *Wharfinger*. " It was held that this certificate was not a " document of title " to goods.

Similarly, a document may amount to an undertaking to deliver goods, but it must be shown to be an undertaking made unconditionally to the holder of the document to deliver them, otherwise it

1 They have been specifically mentioned in order to remove a doubt which has once entertained as to their nature as 'documents showing title to goods.' See G. I. P. R. v. Hanumandas, 14 Bom. 57 (68-69) ; See also Remfry on Sale of Goods, p. 373.

2 (1916) L. R. 43 I. A. 164.

3 (1846), 16 M. & W. 119; 16 L. J. Ex.; 73 R. R. 423.

4 (1875) L. R. 10 Ch. 491 ; 44 L. L. J. Ch. 732.

will uot be a document of title[1]. In this case, the defendants, the sellers of one hundred tons of zinc, gave to the buyers, Messrs. Burss & Co., four undertakings in the following form :" We hereby *undertake to deliver to your order, endorsed hereon,* twenty-five tons merchantable sheet zinc of your contract of this date. " The contract was not for the sale of any specific zinc. The plaintiffs bought from Burrs and Co. fifty tons on the faith of these documents, which were indorsed to them, but which, it was admitted were not documents known among merchants. Burrs & Co. failed, and the defendants refused to deliver to the plaintiffs, whereupon the plaintiffs brought detinue and trover. They contended that the defendants had by the time of the undertaking represented to the plaintiffs " that the goods therein mentioned were the proprety of Burrs & Co., free from all lien or claim whatsoever on the part of the defendants ". But *held,* that these " undertakings " must be construed as any other written instruments, and did not contain any representation of fact—either that the goods were the goods of Burrs & Co., or that they were free from lien; the only representation was that there was a contract, and that the sellers were willing (subject to their rights) to deliver twenty-five tons. The defendants, therefore, were not estopped from setting up that the goods were not the property of the plaintiffs, or their own right as unpaid sellers, to withhold delivery.[2]

In *The Merchant Banking Co of London* v. *Phoenix Bessemer Steel Co.*[3], the defendants under a contract of sale to Messrs. Smith and Co. for steel rails to be delivered in monthly quantities, invoiced the rails to Smith & Co. and at their request sent in addition warrants for the monthly quantities in the following form, *mutatis mutandis* :-

" The undermentioned iron will not be delivered to any party but the holder of this warrant.

"No 88 "Phoenix Bessemer Steel Co. Ltd. Dec. 19,1874."

"Stacked at the works of the Phoenix Bessemer Steel Co., The Ickles, Sheffield. Warrant for 403 tons 2 qrs 9 lbs. steel rails. Iron deliverable (f. o. b.) to Messsrs. Gilead Smith & Co. of London. *or to their assigns by indorsement hereon.*"

Smith and Co., by way of pledge. indorsed the warrants to the plaintiffs, who claimed a first charge upon the iron. The dedendants claimed their lien as unpaid sellers. It was proved that by the usage of the iron trade, warrants in the above form passed from hand to hand without notice being given to the person issuing the warrant and were taken to give to the holders. for value of title *free* from any seller's *lien.* Jessel M. R., drew the inference that the sellers must have intended the warrants to be used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued them in addition to the ordinary invoices of the goods. He held, therefore, that they were estopped from afterwards setting up their claim as unpaid sellers.

1 Farmeloe v. Bain. 1876) 1 C. P. D. 445.

2 As the goods were unascertained, the seller's right (though called a lien in the case) was not a lien but a right to withhold delivery, similar to a lien (section 46). Benjamin on Sale, 7th Edn. P. 908.

3 5 Ch. D. 205 : 46 L. J. Ch. 418.

This decision marks the distinction between a delivery warrant which is a document of title transferable by indorsement and which is intended to represent the goods, and a wharfinger's certificate that the goods are ready for delivery," as in *Gunn* v. *Blockow*[1].

But a document may be a document of title to goods even if it refers to unascertained goods[2].

Bill of lading.

Bill of Lading is a term applied to the documents signed by the master of a ship or by the shipowners or their agents acknowledging the receipt of goods for carriage, specifying the ports of shipment and destination and the conditions under which the goods are accepted for carriage, a full description of the goods, their marking and alleged contents, and undertaking to deliver them to the consignee or to his order or assigns upon payment of the freight stipulated. A bill of lading is usually made out in sets of two or three copies, all of which are signed and which state that they are respectively the original, duplicate, or triplicate copy. An unsigned copy is retained by both the ship's owners' and the master, but all the signed copies together constitute the complete set, *though delivery of the goods will be made from the vessel against production of one signed copy only.* For this reason a bank should always insist on receiving the complete set of bills of lading in respect of any goods against which it makes advances to avoid the possibility of any missing copy being used to obtain prior of the goods. The generally acceptable from of bill of lading states definitely that the goods named in it have been shipped on board a named vessel but another form exists where the goods are stated to have been" received for shipment." This latter form is not favourably regarded by banks, as any delay in shipment might result in the cancellation of the purchase by the buyer or, in the case of perishable goods might result in serious deterioration[3].

There is no statutory definition of the term "bill of lading" although there are various Acts dealing with it. According to Lord Blackburn[4], a bill of lading "is a writing signed on behalf- of the owner of the ships in which goods are embarked acknowledging the receipt of the goods, one undertaking to deliver them at the end of the voyage, subject to such condition as may be mentioned in the bill of lading. The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name. or his assigns, sometimes to order or assigns, not naming any person. which is apparently the same thing. and sometimes to a consignee by name or assigns, but in its usual form it contains the assigns".

1 See Benjamin on Sale, 7th Edn., p. 909.

2 Ant. Jurgens Margarinefrabricken v. Louis Dreyfus & Co. [1914] 3 K. B .40 cf. Anglo-India Jute Mills v. Omademull (1911) 38 Cal. 127, 10 I. C. 859.

3 See Evitt's Practical Banking, 4th Edn., p. 88.

4 Blackburn on Sale. 2nd Ed.. p. 388.

A bill of lading is defined in the Commercial Law of Great Britain and Ireland[1] as a document which (1) acknowledges the receipt of goods on board a vessel (2) is evidence of some or all of the terms on which the goods were received (3) is a symbol of the goods so that a transfer of property in them may be evidenced by endorsement and (4) in the hands of a consignee or endorsee for value is in the absence of fraud or express knowledge of non-shipment, conclusive evidence of shipment against the person who signed it[2]. It is, in form, a receipt from the captain to the shipper or consignor, undertaking to deliver the goods, on payment of freight to some person whose name is therein expressed, or endorsed thereon by the consignor. It is used both as a contract for carriage and a document of title.

At common law the property in the goods could be transferred by the endorsement of the bill of lading, but the contract created by the bill of lading could not; therefore the endorsee could not sue on the contract in his own name[3]. The English Bill of Lading Act, 1855 (18 & 19 Vict. C. III) confers this right, while confirming the common law rights[4]. The law as to the indorsement and delivery of bills of lading was thus stated by Bowen. L. J. in *Sandar* v. *MacLean*[5] : "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would by an actual delivery of the goods. As for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading until complete delivery of the cargo has been made on shore to some one rightfully claiming under it remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

Bill of lading is not negotiable like a bill of exchange and therefore the mere honest possession of a bill of lading indorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The indorsement of a bill of lading gives no better right to the goods than the indorser himself had (except in cases where a mercantile agent, or/person in the position of such agent, may transfer it to a *bona fide* holder under the Factors Act.[6] It was "stated by Lord Campbell, C. J. in the case of *Gurney* v. *Behrend*[7] : A bill of lading is not, like a bill of exchange or promissory note

1 Vol 1, p. 386

2. See English. Bills of Lading Act, S. I; Indian Bills of Lading 1856, S. 3.

3. Thompson v. Dominy (1845) 14 M. & W. 403.

4 See Chalmers, Sale of Goods Act, 11th Ed., p. 188.

5 (1883) 11 Q. B/D. 327, at 341 (C. A); 52 L. J. Q. B. 481, at p. 486.

6 See Benjamin on Sale, 7th Edn. p. 964.

7. (1854) 3 E. & B. 622, at pp. 633-4 ; 23 L. J. Q. B.265; 97 R. R. 687.

a negotiable instrument which passes by mere delivery to *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authorty, a subsequent *bona fide* transferee for value cannot make a title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

Bills of Lading Act.

The common law rule that the assignee of the bill of lading could not sue upon the contract contained in it is abrogated by the Indian Bills of Lading Act, IX of 1856[1], the first two sections of which are as follows:—

" (1) Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

(2) Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

As the result of that enactment, the endorsee can both sue and be sued by the carrier upon the bill of lading. It is only, however, where the property, as distinguished from some special property in the goods, is passed by the endorsemment that the Act applies. In *Sewell* v. *Burdick*[2] a bill of lading had been endorsed by way of pledge to bank, but in the circumstances of the case the pledgees never applied for delivery of the goods to them. *Held*, that they could not be sued upon the contract contained in it.

If, however, the pledgee presents the bill of lading and demands delivery of the goods by virtue of it, a contract may be inferred between him and the carrier to deliver and accept the goods according to the terms of the bill of lading, and the exceptions from liability in the bill of lading may be relied upon by the carrier, and conversely, all circumstances which would prevent him from relying upon snch exceptions as against the original party to the bill of lading, will properly be relying upon those exemptions as against the assignee.[3]

In effect, therefore, a pledgee of a bill of lading, who demands delivery of the goods, will be in the same position as if he had been a

1 See Appendix G. Cf. the English Bills of Lading Act, 1855 (18 & 19 Vict. C. III) which is the same as the Indian Bills of LadiAct, 1856 (IX of 1856).

2 (1884) 10 App. Cas. 74.

3 Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co., (1924) 1 K.B. 575 C. A.

party to it, or as if it had been endorsed to him in such circumstances as to pass the property to him.

Receipts issued by ship-owners to shippers for goods delivered at the warehouse for shipment though ordinarily accepted by the shipper's agents at the ports of delivery as entitling the consignee to delivery are not evidence of shipment and cannot be strictly treated as bills of lading[1]. The only point in which a bill of lading differs from other documents of title is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers[2].

Dock warrant.

Section 111 of the English Stamp Act, 1891 (54 & 55 Vict. C. 39) defines the expression "warrant for goods" as meaning 'any document or writing, being evidence of the title of any person therein named, for his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise'. A dock warrant is therefore a document issued by a dock or wharf owner, setting out the detailed weights or measurements of a specific parcel of goods, and declaring or certifying that the goods are held to the order of the person named, or his assignee by endorsement, and are deliverable to a person therein named or his assigns by endorsement. Like a bill of lading it passes by endorsement and delivery and transfers the absolute right to the goods described therein to the endorsee.

Ware-house-keeper's certificate.

A warehouse is a public house in which goods imported are deposited at a reasonable rent without payment of the duties on importation ; if they are to be withdrawn for house consumption, then without payment of such duties until they are so removed[3]. According to the merchant Shipping Act, the expression 'ware-house' includes all ware-houses, buildings and premises in which goods when landed from ships , may be lawfully placed; and the ware-house keeper means the occupier of a ware-house, *i.e.*a person in charge of a ware-house.

A wharfinger's or warehouseman's certificate, when it is not in the form of a warrant, is simply an acknowledgment that goods described therein are deposited at the wharf or in the warehouse, and is generally expressed to be not transferable. Both a warrant and a certificate may be subject to conditions[4].

Wharfinger's certificate

A wharf is a broad plain place near a river canal or other water to store goods thereon which are brought to or from such water[3]. According to the Merchant Shipping Act the expression 'wharf' includes all wharves, quays, docks, and premises in or upon which any goods when landed from ships may be lawfully placed and, the expression 'wharfinger' means any person who occupies or is in charge of such wharf.[5]

1 Nissim Isaac v. Haji Sultanjee, 40 Bom. 11 (18).

2 Ramdass Vithaldas v. Amer Chand & Co. 40 Bom. 630 (637).

3 See Benjamin, on Sale, 7th Edn., p. 894.

4 Moz. and Whit. Dictionary.

5. See also 'Commercial Laws of England, Merchant Shipping Act.

A wharfinger is a person who owns or keeps a wharf for the purpose of receiving merchandise with a view to its being shipped, on payment of hire charges.

The definition of "document of title" in the English Factors Act, 1889, does not specifically include wharfinger's certificate. The Indian Sale of Goods Act, 1930, has thus expanded the definition in the English Act. Like the warehouse-keeper's certificate, it is only an acknowledgment by a wharfinger that particular goods are lying at his wharf, unless it is in the nature of a warrant.

Delivery order.

Delivery orders are orders given by the owner of goods to a person who holds possession on his behalf directing him to deliver them to a person named in the order. As observed by Martin, B, in *Morgan* v. *Gath*:[1] "A delivery order is an order from the vendor warehouseman to deliver the goods to the vendee." A delivery order, properly so called, is, until it is acted upon, a mere "promise to deliver[2]". To be a document of title it must be in the nature of a warrant and must represent the goods[3]. In this case the defendants, warehousemen, held maize in bulk belonging to A who sold 200 quarters thereof to B who sold to the plaintiffs, giving them a delivery order which they lodged with the defendants. The defendants did not object to the order, but they did not make any acknowledgment of the plaintiff's title. Before any appropriation of the 200 quarters, A, as unpaid vendor, put a stop on delivery. It was held by the Court of Appeal, affirming Sankey. J., that the mere receipt of the delivery order by the defendants without objection did not estop them from denying that the plaintiffs were the owners of the 200 quarters. All that had happened in this case with regard to the delivery order was that it had been handed to the defendants. No entry of the fact was made in the defendant's books[4].

It is to be observed that as between buyer and seller a warehouse certificate, dock warrant or delivery order, or any similar document, does not, like a bill of lading, represent the goods themselves, and so does not *per se* transfer possession: it operates merely as an authority to receive the goods referred to in the document; an attornment by the person in possession to the buyer is necessary[5]; and this is the rule, for whatever purpose a delivery of the goods has to be proved[6].

Delivery chit-Sukkur Pass Godown delivery terms contract.

A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery

1 (1865) 159 E. R. 726; See also Anglo-Indian Jute Mills v. Omademull, (1910) 38 Cal. 127; 10 I. C 859; Imperial Bank v. St. Katherine's Dock. (1877) 5 Ch D. 195.

2 Per Lord Esher, M. R. in Gillmaan v. Carbutt (1889). 61 L. T. 281 (C. A.)

3 Per Sankey J. in Laurie & Morewood v. John Dudin & Sons (1925) 2 K.B. 383, 390.

4 Laurie & Morewood v. Dudin, (1926) 1 K. B. 233; 95 L. J. K. B. 191 (C. A.)

5 See Farina v. Home (1846), 16 M. & W. 119, at p. 123 (dock warrant ante; Gunn v. Bolckow (1875). 10 Ch. App. 491 (warehouse certificate ante); M. Ewan v. Smith (1849). 2 H. L. Cas. 309; 39 Digest 522 (delivery order).

6 See Halsbury, Laws of England, 2nd Edn; Vol. XXIX, p. 17.

without payment of 90 per cent of the price of the goods is not a document of title within the meaning of S. 2 (4) of the Act[1].

Railway receipt.

The definition in the English Act does not mention " railway receipt " as included in ' documents of title ' to goods. The Indian Sale of Goods Act, 1930, specifically mentions railway receipt as included in this expression. This is based on a decision of the Privy Council in *Ramdas* v. *Amerchand*[2], wherein their Lordships held that a railway receipt was an instrument of title within the meaning of section 103 of the Indian Contract Act. An unendorsed railway receipt is not a document of title and is not used in the ordinary course of business as proof of the possession or control of goods; but if a person gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company, and the fact that in the rules printed on the railway receipt the railway company states that it will not recognize an agent appointed otherwise than by endorsement will not prevent the railway company from pleading that other person was in fact an agent and entitled to receive the goods. The rule, however, may operate as an estoppel if the consignor has acted on the belief that the railway company would not recognize as his agent the person to whom the railway receipt has merely been sent without endorsement.[3]

In *Official Assignee* v. *Madras Mercantile Bank*[4] the Judicial Committee held, affirming the decision of the High Court, that a railway receipt was a document of title within the meaning of the old section 18 of the Indian Contract Act and that the endorsement and delivery, by way of security for a loan, of a railway receipt is sufficient to create a valid pledge of the goods covered by the receipt, though by the general law, a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledgor for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them in the pledgee's godowns[5].

In *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*,[6] bank A advanced loans to a merchant on the pledge of railway receipts. Following the usual practice, the railway receipts were handed over back to the merchant for the specific purpose of clearing goods represented by the railway receipts from the Port Trust and storing them in the bank's godowns. The bank did not put its stamps on the railway receipts. The merchant fraudently pledged the same railway receipts to bank B and obtained a second advance.

1 Hakumat Rai Arjan Das v. Nandu Virdimal. A. I. R. 1941 Sind 78=195 I. C. 137

2 (1916) 40 Bom. 630=1916 P. C. 7; See also G. I. P. v. Hanumandas 44 Bom. 57 (68-69).

3 Secretary of State for India in Council v. Rishi Ram Jagdish Prashad (1927) 50 All 227= 108 I. C. 457.

4 A. I. R. 1934 P. C. 246=(1935) A. C. 53=(1934) 58 Mad. 181=152 I. C. 730 on appeal from (1933) Madras 207=56 Madras 177=143 I. C. 641.

5 Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.=A. I. R. 1938 (P. C.) 52.

6 A. I. 1938 (P. C.) 52=I. L. R. (1938) Madras 360.

Thereupon bank A brought against bank B an action for conversion. Bank B raised a plea of estoppel against bank A.

Held, that the plea of estoppel could not be availed of. Bank A did not owe any duty to bank B in the matter. There was no relationship of contract of agency. There was also no representation by bank A which had no reason to think that it was representing to anybody that the merchant had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchant with them. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was at the best an ambiguous document. Its possession no more conveyed a representation that the merchant was entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It was not like a negotiable instrument. The document on its face conveyed no representation when presented that the merchant was invested with full disposing power. It was not indeed true to say without qualification that people were not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. Bank A, therefore, was entitled to rely on the rule of law that no one could pass a better title than he possessed.

Held further, that the failure to place its stamps would make no difference. It was not the practice nor duty as between the two banks to adopt such a practice.

In *The Madras and Southern Railway Company, Limited* v. *Haridas Banmalidoss*[1], a case under section 72 and old section 77 of the Indian Contract Act, 1872 (since repealed) it was held that the liability of a Railway Company under the Indian Railways Act in respect of goods consigned for carriage is at an end when the goods are delivered to a person rightfully entitled to them even though he is the consignee and even if the delivery is not made against the railway receipt. After delivery of the goods to the rightful person, the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt after delivery to such a person has no cause of action for damages against the Railway Company.

A Railway Company is not under any duty to the public to insist upon the return of the railway receipt.

Held further that delivery of goods by the Railway Company without getting in the railway receipt was not the proximate cause of the loss to the endorsee.

In this case, on 23rd July, 1914, Gurunathan at Gantur delivered 64 bales of cotton to the appellant Railway Company for carriage, to Madras, and on the same day the Railway Company issued a railway receipt in which Gurunathan appeared both as consignor and consignee. This railway receipt was immediately endorsed by Gurunathan to the Bank of Madras. The bales arrived in Madras on 29th July, 1914 and lay in the Harbour Station until

1 I. L. R. 41 Madras 871.

4th August, 1914 when they were delivered to a firm trading as Swaminatha Reddy & Co. At the date of this delivery Swaminatha Reddy & Co. had not purchased the cotton from the Bank and had not received an assignment of the railway receipt and were not in possession of it, and the cotton was permitted to be taken away without the receipt being produced or given up. Three days thereafter, however, namely on 7th August, 1914, Swaminatha Reddy & Co. did pay the Bank the value of the cotton and obtained the railway receipt duly endorsed in their favour. On 21st August 1914, Swaminatha Reddy & Co. pledged the railway receipt with Haridoss, the plaintiff in the suit, and it was assumed throughout that the pledge was for money usually advanced in good faith and under the belief that the cotton was at the moment of pledge in the custody of the Railway though it had been taken delivery of by Swaminatha Reddy & Co. two weeks before that firm had induced him to lend money on the pledge of the railway receipt. Plaintiff, without giving notice of the claim to the Railway Company within six months from the delivery for carriage as provided by section 77 of the Indian Railways Act, brought a suit for damages alleged to have been caused to him by the failure of the defendant Railway Company to deliver the goods to him. The Railway pleaded *inter alia* (1) that it had delivered the goods to the rightful person then entitled, namely, Swaminatha Reddy & Co., (2) that the liability of the Railway Company in respect of the goods was then at an end, (3) that the company was not bound to get back the receipts on delivery of the goods. (4) that it was not liable for the fraudulent endorsement of Swaminatha Reddy to the plaintiff after delivery of the goods and (4) that the suit was not maintainable for want of notice of claim within six months of the consignment as required by section 77 of the Indian Railways Act.

The High Conrt held *inter alia*, that the suit was barred for want of notice under section 77 of the Indian Railways Act which applies to claims for compensation arising not only from non-delivery or accidental loss or destruction or deterioration of goods but also from wilful delivery to a person not entitled to them.

Mate's receipt.

Regarding the inclusion of a mate's receipt in 'document of title to goods, the Select Committee observed as follows :—

"A suggestion has been made that a mate's receipt should be included in the definition of 'document of title to goods.' We considered the suggestion and have come to the conclusion that notwithstanding the irregular practice in Calcutta of treating a mate's receipt on the same footing as a bill of lading, a mate's receipt is a mere acknowledgment of the receipt of goods on behalf of the ship. The person in possession of the mate's receipt is as a general rule entitled to a bill of lading, which is the document of title to the goods. The High Court of Calcutta has taken the same view and we are not aware of any judicial decision which regards a mate's receipt as a document of title. In England it has been held that mere endorsement of transfer of a mate's receipt without notice to the ship-owner or his agent does not pass the property in the goods, and a custom to that effect is bad. (*See* Scrutton on Charter

Parties, page 169.) If a mate's receipt were treated as a document of title, then on the issue of a bill of lading without the mate's receipt having been surrendered, there will be two documents of title in existence relating to the same goods. This would be highly undesirable from a business point of view."[1]

A mate's receipt is a mere acknowledgment of the receipt of goods on board the ship, and the person in possession of it is generally entitled on surrendering the receipt to get a bill of lading[2]. Ordinarily, the holder of the mate's receipt is the person entitled to the bill of lading[3], but this is not necessarily the case, and the master of the ship may properly sign bill of lading in favour of the shipper of the goods without production of the mate's receipt, if he is otherwise satisfied that the goods are on board the vessel, and has no notice that anyone but the shipper claims any interest in them[4].

See also notes under section 25.

Cash receipts.

Cash receipts given in place of delivery order are not documents of title[5]

Any other document, etc."

The common law drew a distinction between bills of lading and the other documents of title for which a transfer of a bill of lading was always held to operate as a delivery of the goods; a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession[6]". But for the *purposes of this Act* all the documents enumerated in S. 2 (4) have been placed on the same footing as a bill of lading.

As has already been referred to above, to bring any document within the description of "document of title" it must be shown that it is used in the ordinary course of business as proof of possession or control of goods or representing the goods.

Thus the question whether a wharfinger's certificate is or is not equivalent to a document of title depends upon its form. If it purports to be a delivery warrant making the goods deliverable to "A B or his assigns by endorsement or otherwise" the warrant or certificate then represents the goods, and is used as proof of the possession or control of them. This was the form of certificate in *Farina* v. *Home*. A document in this form would clearly be included in the general words of the definition. If, on the other hand, the document is in form only a certificate that the goods are lying at the wharf and ready for delivery, it does not and is not intended to represent the goods; it does not authorise or purport to authorise the holder to receive them; it is therefore, not a document of title, and no alleged custom of trade can make it. This was the form of certificate, in *Gunn* v. *Bolckow*[7].

1 Report of the Select Committee, Appendix E.
2 Juggernath v. Smith, 1906) 33 Cal. 547; Natcheappa v. Irrawaddy Flotilla Co. (1914) 41 Cal. 670.
3 Crown v. Ryder, (1816) 128 E. R. 1103; 16 R. R. 644; 644; Ruck v. Hatfield, (1822) 106 E. R. 1321 : 24 R. R. 507.
4 Hathesing v. Laing (1873) L. R. 17 Eq. 92; Cowasjee v. Thompson (1845 5 Moo. P. C. 165, 70 R. R. 27.
5 Kemp v. Falk (1882), 7 App. Cas. 573, at p. 585.
6 Blackburn, 302.
7 10 Ch. App. 491.

(5) "Fault."

"Fault" means wrongful act or default.

This definition is the same as in the English Act, and is required in sections 8, 10 (2) and 26[1].

The word "wrongful" imports "the infringement of some right"[2]. It is a purely relative term like negligence, and has been defined, in the case of a sale of land, as "meaning nothing more, nothing less than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction[3]".

(6) "Future Goods".

"Future goods" defined.

This definition follows the definition of the term in the English Act, with the addition of the words "or produced" in this Act, so as to include specifically agricultural products.

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller or future goods. There may be a contract for the sale of *contingent* goods *i. e.* goods acquisition of which by seller depends upon a contingency which may or may not happen *e.g.*, a crop not yet sown.[4]"

The goods forming the subject of the contract of sale may thus be either -

(1) *Existing* goods ; or

(2) *Future* goods ; or

(3) *Contingent* goods.

Existing goods may further be either—

(1) *Specific* goods *i.e.* goods defined only by a description applicable to all goods of same class.

(2) *Unascertained* goods *i.e.* goods defined only by a description applicable to all goods of same class.

"Future goods" according to the definition in this Act, mean goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

The term "future goods" although not very happy has been held to be convenient. As a general rule any person may sell or offer for sale at any price whatever goods of which he is not the owner, but which he expects or hopes to acquire.[5]

It it to be noted that future goods are not the same as unascertained goods *e.g.* the future crops of a particular named orchard is a class of future goods, midway between specific and

1 Mogul Steamship Co. v. McGregor, Gow & Co., (1889), 23 Q. B. D. 598, C. A.

2 Hatbesingh v. Laing (1813) L R. 92; Cowasjee v. Thompson (1845) 5 Moo. P. c. 165, R.R. 27

3 Re Young and Hartson's Contract (1885), 31 Ch. D. 168, C. A., p. 174 See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 101.

4 See section 6 of the Act.

5 Per Stirling J. in Ajello v. Worsley (1898) I Ch. 274=67 L. J. Ch. 172.

unascertained goods. In *Watts* v. *Friend*[1] the bargain was that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be a contract of sale of future goods[2].

Again, in *Wilks* v *Atkinson*[1] a contract to sell oil, not yet pressed from seeds in his possession, wes held to be a contract of sale of future goods.

See also notes under section 6 of the Act.

(7) "Goods"

Goods : definition.

The definition of "goods" under the present Act is wider than the definition contained in the English Sale of Goods Act, 1893. Section 62 (1) of that Act defines "goods" as follows :—

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The present definition expressely includes stock and shares which are not "goods" according to the English Act. In England scrips and shares are things in action in the same way as bills, notes and cheques[3]. The inclusion of shares in the definition of "goods" under the Indian Act is based on the decision in *Fazal* v. *Mangal Das*[4] wherein it was held that the term "goods" as used in Chapter VII of the Indian Contract Act, 1872, has a much wider sense than it has in the English law, and includes share certificates.

It is to be noted that while the definition in the English Act is *inclusive*, not exhaustive, the definition in this Act is apparently intended to be exhaustive (the word used here is "means"). Of course, the definition is governed by the opening words of the section *viz.* "unless there is anything repugnant in the subject or context".

Section 76 of the Indian Contract Act defined the goods as 'meaning and including every kind of moveable property'. This definition was interpreted to include share certificates[5] but not choses in action[6] or money[7] or emblems of money constituting legal tender[8] or a house apart from its site[9].

1 10 B. & C. 446; 8 L J (O. S.) K. B 181 : 34 R. R. 477.
2 (1815) E R 935
3 See Humble v. Mitchell (1839), 11 A & E 205; 52 R. R. 318 ; Colonial Bank v. Whinney (1886), 11 App. Cas. 426 (a case of shares) Lang V Smith (1831). 7 Bing. 284 (foreign bonds ;) Freeman v. Appleyard (1862) 32 L.J. Ex 175 : 139 R. R 790 (certificate of railway stock). See also Chalmers, Sale of Goods Act, 1893, 11th Edn., p 159.
4 (1922) 46 Bom. 489 : 66 I. C. 326 ; See also Manerkji Pestonji Bahrucha v. Wadilal Sarabhai (1926) 53 I A. 92,50 Bom. 360, 94 I. C 824 ; Domingo v. De Souza (1928) 50 All. 695. In Lalit v. Haridas (24 C. L. J. 335) a contrary view was taken in construing the word "goods in section 178 of the Indian Contract Act,
5 Fazal v. Mangaldas, 46 Bom. 489; Hazarimull v. Satish, (1918) 46 Cal 331
6 14 C.P, L.R. 57 (59) ; Morgan v. Russel (1909) I.K.B 357.
7 Empress v. Joggessur Mochi, 3 Cal. 379. (1878) P. R. 73 ; 1905 P. R. 18.
8 Ibid.
9 Narayana v. Ramaswami. 8. mad. H. C. 100 (102)

Actionable claims were not excluded from the definition contained in that section. It was accordingly held that the definition included not only registered shares but also title to get on the register, which in England would be treated as a chose in action[1]. The present definition excludes actionable claims with the exception of stock and shares and money. It is, therefore, narrower than the definition in section 76 of the Indian Contract Act.

Moveable property—things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale are 'goods'.

Section 3 (34) of the General Clauses Act, (1897), Act X of 1897), defines "moveable property" as meaning 'property of every description except "immoveable property." and clause (25) of the same section defines "immoveable property" as including 'land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth'. Notwithstanding the definition of moveable and immoveable property in the General Clauses Act, 1897, the concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than growing crops and grass. Under the Act the sole test appears to be whether the thing attached to the land, has become by agreement goods, by reason of the contemplation of its severance from the soil. Thus "goods" also include things attached to or forming part of the land, not only when they are to be severed before sale, but also when they are agreed to be severed "under the contract of sale", that is to say, in performance of the seller's duty to deliver or to allow the buyer to take them.

In English law 'emblements *i.e.* such vegetable products as are the annual result of agricultural labour such as corn, hemp, melons and potatoes[2], were always considered to be "goods", but somewhat subtle distinctions were drawn in the case of *fructus naturales*, that is, the natural produce of land, such as fruit on trees.

Most of the decisions before the English Sale of Goods Act, 1893, arose on the construction of the Statute of Frauds (29 Car. 2, C. 3), which uses the expression "goods, wares, and merchandises," and this expression was somewhat artificially extended in order to bring contracts of sale within the 17th rather than the 4th section of that Act, which does not recognise part performance. The first principle at common law before the Act, according to Lord Blackurn is, that agreement to transfer the property in anything attached to the soil at the time of the agreement but which is to be severed from the soil and converted into goods *before the property is transferred* to the purchaser, is an agreement for the sale of goods within section 17 of the Statute of Frauds. The second principle is that where there is a perfect bargain and sale vesting the property at once in the buyer *before severance*, a distinction was made between the natural growth of the soil, as grass, timber, fruits on trees, etc. etc. which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labour of men, in sowing

1 Maneckji Pestonji Bharucha v. Wadilal Sarabhai (1926) 53 I.A. 92, 50 Bom. 360; 94 I. C. 824.

2 See Williams on Personal property, 18th Ed., p. 79; Chalmers' Sale of Goods Act, 11th Ed., p. 159

and reaping, planting and gathering. If *fructus naturales* were to be delivered by the seller who was to sever them himself and deliver them, they were goods within the meaning of the 17th section. If the buyer was to take them away, "the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining. If so, they came within the 4th section. If not, and they were to be delivered immediately, even though the buyer was to enter and take them, they came within the 17th section. *Fructus industriales* are *chattels*, for at common law a growing crop, produced by the labour and expense of the occupier of lands, was, as the representative of that labour and expense, considered an independent chattel[1].

The doubt as to whether a sale of emblements before severance is a sale of goods, has been dispelled by section 62 (1) of the English Act, which declares them to be goods. By the same section "industrial growing crops" are declared to be goods, and as regards things "attached to or forming part of the land" this section specifically declares that those which are agreed to be severed before sale or under the contract of sale, are "goods". The distinctions at common law pointed out above are not of any importance under the definition of "goods" under the Sale of Goods Act. Now under a contract of sale things attached to or forming part of the land, whether the property is to pass to the buyer before or after severance, are to be deemed "goods". The enactment has removed all doubt with regard to fixtures, and has certainly altered the law with regard to buildings sold as materials, and with regard to *fructus naturales*. If the parties agree that such things shall be severed, they thereby become "goods[2]".

The definition of "goods" in the Indian Sale of Goods Act, 1930, includes all growing crops and grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. No departure from English law is contemplated.

Fixtures and buildings sold as materials.

"Things attached to or forming part of. the land" include fixtures and buildings sold as materials : and a contract for the sale of them will be a contract for the sale of "goods" if they are "agreed to be severed before sale or under the contract of sale". But where either the purchaser of the land or an incoming tenant, enters into an *entire* contract to take the land and the fixtures, they are still not to be deemed "goods". Thus there would be no contract of sale of "goods" where a landlord sells landlord's fixtures to an incoming tenant, or an outgoing tenant sells tenant's fixtures to his landlord, or to an incoming tenant, or purchaser of the land ; or an incoming tenant or purchaser of the land agrees to take the land together with fixtures.

1 See Benjamin on Sale, 7th Ed., pages 182 to 195 ; Chalmers, Sale Goods Act. 11th Ed., pages 159 & 160 : and the cases cited thereunder.

2 See Benjamin on Sale, 7th Ed., p. 198.

In *Lee* v. *Risdon*,[1] where the defendant, who on becoming tenant of the plantiff's house had agreed to purchase from the plaintiff, the lessor, certain fixtures at a valuation. was sued in action for *goods* sold and delivered, it was held that fixtures could not be recovered in that form of action, as the fixtures were, while unsevered, part of the freehold.

The same principles will apply to *fructus naturales*. Thus, where there was a sale of growing crops of wheat at a separate price to an incoming tenant. it was held that this contract was distinct from the contract to demise the land and therefore the balance of the price, part of which had been paid, could be recovered[2]. On the other hand, where a farm was leased, and the tenant had in cousideration of the demise verbally agreed to take the growing crops of corn and turnips and pay for them and for the labour and materials expended, according to a valuation, but these things were not excepted out of the demise, it was held that the whole was an *entire* contract for an interest in land under section 4 of the Statute of Frauds.[3]

Things attached to land

Apart from growing crops and grass things attached to the land or forming part of the land are goods only if they are agreed to be severed before sale or under the contract of sale. So it is a question of construction of the contract in each case.

In *James Jones & Sons* v. *Tankerville*[4] there was a sale of growing timber, the buyer was to cut and remove the timber for which purposes he would have all facilities and right of access to the land. The court was of opinion that the property in the timber cut passed to the purchaser but not in the uncut timber; and that goods under S. 62 of the English Act included growing timber which was to be severed under the contract of sale, whether by the vendor or purchaser. In *Lavery* v. *Pursell*[5] there was a contract for the sale of the building materials of a house which were to be taken down and cleared off the ground (by the purchaser) within two months. It was held to be a sale of an interest in and concerning land and came within section 4 of the Statute of Frauds.[6] In *Vohra* v. *Ramchandra*[7] there was an agreement in writing for the sale of standing trees to be cut by the purchaser when they attain a certain size. The court seemed to be of opinion that there was a sale of an interest in land though the decision turned on a question of stamp duty.

1 7 Taunt 188; 17 R. R. 484; See also Benjamin on Sale, 7th Ed., pp. 194, 195 & 198.
2 Mayfield v. Wadsley, 3 B. & C. 357.
3 The Earl of Falmouth v. Thomas, I Cr. & M. 89; 2 L. J. Ex. 57; 38 R. R. 584.
4 (1909) 2 Ch. 440.
5 (1888) 39 Ch. D. 508.
6 Cases decided under the Statute of Frauds are to be applied with caution for there the Court was concerned with the question whether the things were "goods wares or merchandise." Under the Sale of Goods Act it is immaterial whether the things were to be severed by the buyer or seller. The only question is whether they have become by agreement goods by reason of the contemplation of their severance from the soil.
7. (1897) 22 Bom. 785.

Coal, minrals, gravel sand etc.

In *Morgan* v. *Russel& Sons*[1], on the sale of all the cinders and puddle slag or iron slag on certain lands to be taken by the buyers, it was held by the County Court Judge that the cinders were not separate things, but had become part of the soil itself, and that the contract therefore was for the sale of land, and not for the sale of goods. On appeal this decision was affirmed and it was observed—"The cinders and slag...were not definite or detached heaps resting, so to speak, on the ground...I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor was it a contract for the sale of a heap of earth which could be said to be a separate thing...The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton."

Minerals while embedded in the earth or forming part of it are not goods, but when severed from the earth they are goods. So a contract for the sale of minerals which are to be severed before sale is a contract for the sale of goods. It is a question of construction in each case.

Growing crops and grass—time of attachment to soil.

Benjamin has observed[2].: "Inspite of the fact that the Act (English Sale of Goods Act, 1893) recognises contracts for the sale of 'future' goods, the language of the definition of 'goods' points to an attachment of the thing to the land at the time of the contract. Accordingly, a contract for the sale of an unsown crop of grass, to be cut by the buyer at maturity, would be a contract for an interest in land."

In *Watts* v. *Friend*[3], however, there was a sale of a crop not yet sown. The bargain was, that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within section 17 of the Statute of Frauds, as the thing agreed to be delivered would at the time of delivery be a personal chattel.

A growing crop may include crops which do not require annual cultivation, requiring only periodical care and attention.[4]

See further notes under section 6 of the Act.

"Goods" means every kind of moveable property other than actionable claims and money

'Moveable property, is not defined in the Act, but the General

1 [1909] 1 K. B. 357 ; 78 L. J. K. B. 187.

2 Sale of Personal Property, 7th Ed. p. 199 ; See also the cases cited therein. See also Imamali v. Priyawate A. I. R. 1937 Nag. 289) wherein it has been held that a "growing crop" necessarily means a crop which is in existence and which is in the process of coming to fruition.

3. 10 B. & C. 446 ; 8 L. J. (O. S.) K. B. 181 ; 34 R R 477 See also Misrilal v. Mozhar Hussain, (1886) 13 Cal, 262 (future indigo crops).

4. See Graves v. Weld (1833) Crops Ba. & Ad. 105

Clauses Act, section 3, clauses 25 and 35 define it, as already referred to above.

"Actionable claims" is defined in section 3 of the Transfer of Property Act, 1882, as meaning 'a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent.

Chief instances of actionable claims are:—

(a) Claim for arrears of rent.

(b) A claim for rent to fall due in future, being an "accruing debt".

(c) The benefit of an executory contract for the purchase of goods is a 'beneficial interest in moveable property,' and is therefore an actionable claim within the meaning of this section.

(d) A right to get by division a piece of land reserved by a donor for his own uses in his deed of gift (but possession of which was with the donee) is an actionable claim.

(e) A share in a partnership.

Their transfer is governed by sections 130 to 137 of that Act.

Decree

A decree is "movable" property as defined by S. 3 (34) of the General Clauses Act, and as such falls within the definition of "goods"[1] in S. 2 (7) of the Sale of Goods Act of 1930. A sale of decree may be made orally and it is not necessary that the assignment of a decree to be valid should be in writing. O.21, R. 16, C.P. Code can only be construed as laying down that the requirement of a transfer in writing is a mere requirement of procedure. It is not a substantive enactment which says that unless there is an assignment in writing of a decree, a transfer, though made orally, shall be inoperative or void.

Money

Money, that is to say *current money* is necessarily excluded, because in sale the goods and the price are contrasted, and wholly different considerations apply to them.[2] . If a man changes a sovereign for another the contract is exchange, not sale. But a Jubilee five-pound gold piece brought as a curiosity, may be treated as goods and not as money[3].

"Goods" does not include money and emblems of money constituting "legal tender", such as currency notes[4].

1 Vithaldas v. Jagjivan, (1939) 41 Bom L. R. 33=1939 Bom 84—180 I.C. 850 (2)
2 3 Cal 379 ; 18 P R. 1905
3 Moss v. Hancock, (1899) 2 Q. B. III
4 Cal. 379 ; 73 P.R. 1878 18 P.R. 1905

Where, however, a particular sum of money is entrusted by one to another, the former may follow it or an equivalent of it in the hands of third parties to whom it has been given or claim a charge on any property acquired with the sum entrusted. To this extent, money is in the nature of goods[1]. But when once it has passed in currency, it cannot be followed[2].

Ships.

"A ship is clearly a chattel personal, but it is governed by so many special rules that it is doubtful how far it comes under the denomination of "goods" for the purposes of the Act. But unless, and except in so far as there is some provision to the contrary, the Sale of Goods Act appears to apply[3].

In *Hooper* v. *Gumm*,[4] Turner L. J. observed : "A ship is not like an ordinary chattel. It does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships. In the case of American ships the laws of the United States provide the means of evidencing the title to them" (as the Merchant Shipping Act, 1894, does for British ships).

Gas, water, electricity, etc.

It has been doubted whether these can be classed as goods for the purposes of the English Act[5]. The Calcutta High Court has observed that it is doubtful whether the Sale of Goods Act is applicable to electricity[6].

Shares in company

Shares in a company are goods within the meaning of the Act[7].

Miscellaneous.

A special Act like the Sale of Goods Act, cannot, except in the branch of the law to which it specially applies, overrule a statute of the nature of the General Clauses Act. The definition of "goods" in this Act cannot therefore be used in order to override the definition of "immoveable property" in the General Clauses, Act, 1897, so as to give a Court jurisdiction to try a case in substance relating to the title to immovable property situate outside its territorial jurisdiction.[8]

1. Banque Belge v. Hambrouck (1921) 3 K. B. 32; cf. Knatchbull v Hallet, (1881) 73 Ch. D 696.
2. See Miller v. Race (1758) 1 Burr. 452, 457
3. See Chalmers, Sale of Goods Act, 11th Ed., p. 161; Behnke v. Bede Shipping Co. Ltd. (1927) 1 K. B. 649; cf. Lloyd del Pacific v. Board of Trade (1929) 35 Ll.L.R. 217, where it was assumed that the sale of ship was within the provisions of section 14 of the English Act. corresponding to section 16 of the Act.
4. (1857), 2 Ch. App. 282, at p. 290
5. See Chalmers, Sale of Goods Act, 11th Ed., p. 160; Ferens v. O'Brien (1883) 11 Q. B. D. 21. County of Durham Electric Power Co. v. Commissioners of Inland Revenue, (1909) 2 K.B. 60 An agreement between an Electric Co. and one of their customers was assumed to be an agreement for the sale of "goods, wares or merchandise" within the meaning of the English Stamp Act 1891 but the point was not decided. Erie County Fuel Co v. Carroll, (1911) A C. 116 P. C. (natural gas, measure of damages); Read v. Croydon, (1938) 4 A. E. R 631 (sale of water is within the Act).
6. Rash Behari Shaw v. Emperor, (1936) Cal. 753=41 C. W. N. 225.
7. Kissenchand v Ram Pratap, 44 C. W N. 505.
8. Swami Iyah Nadar v. Commissioners of the Port of Rangoon=(1931) 9 Ran. 15: A. I. R 1931 Ran. 109 134 I. C. 511

It is, however, to be observed that whereas in S. 62 of the English Act goods include chattels personal, in the Indian Act words "goods include moveable property", are used, and the latter expression, as already examined, includes everything which is not immoveable property. Will therefore gas, electricity, and water be included in the definition of "goods" under the Indian Act ?

In America the words "goods, wares and merchandise" have been given a wider meaning and have been held to include stock, bills and notes as being the subjects of common sale or barter which have a visible and palpable form[1].

(8) "Insolvent."

The *explanation* added to section 96 of the Indian Contract Act, 1872, defined the term "insolvency". (A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.) The present definition follows on the lines of the English Act which again is based on the rule at common law under which insolvency was frequently held to mean inability to pay one's debts[2]. Failure to pay one just and admitted debt would probably be sufficient evidence of this inability, though "stopping payment" has been considered conclusive evidence of such inability[3].

The point to be noted is that the term is not used in the technical sense which it has in Insolvency Law. Whatever doubt might have been entertained under the definition in S. 96 of the Indian Contract Act, 1872, the definition given here is comprehensive enough to include all those persons in the category of insolvents who have ceased to pay their debts in the ordinary course of business or cannot pay their debts as they become due, it being immaterial whether they have committed an act of insolvency or not. Under the present definition it is not necessary that they should have committed an act of insolvency or that such ceasing to pay or incapacity to pay must amount to an act of insolvency making them liable under the Insolvency Act to be declared insolvent. All that is necessary is that they must have ceased to pay their debts in the ordinary course of business or be unable to pay them as they fall due. In England, even before the enactment of the Sale of Goods Act, 1893, the law regarded a general[4], or even an avowed inability to pay[5], or a petition for liquidation[6], sufficent for the buyer to be considered insolvent and to give the seller his right of stoppage in transit.

The term occurs in sections 46, 47 and 50 of the Act. The question of the insolvency of the buyer is of considerable importance

1 Green v. Brookins, 9 Am. Rep 74; Gadsden v. Lance, 37 Am. Dec. 548.

2 Parker v. Gossage (1835), 2 C. M. & R. 617; 5 L. J. Ex. 4; Biddlecombe v. Bond (1835), 4. A. & E. 322, 696; 43 R. R. 351, see per Willes, J., in The Queen v. Saddlers' Co. (1863) 10 H.L.C. 404, at pp. 425, 426, 138 R.R. 217 of, London and Counties Assets Co. v. Brighton Grand Concert Hall and Picture Palace Ltd. (1915) 2 K. B. 493, C.A. Scotsman x. Ln. York Ry. Co. (L. R. I. Eq. 360); it is sufficient to show that the person is in such circumstances as not to be able to meet his engagements.

3. Dixon v. Yates (1833) 5 B. & Ad. 313,39 R. R. 489; Bird v. Brown (1851) 4 Ex. 786, 80 R. R. 785.

4 Parker 2. Gossage, 2. C. M. & R. 617; Biddlecombe v. Bank, 4 A. & E. 322, 696.

5 Exparte Carnforth Haematite Iron Co., 4 Ch, D. 108, C. A.

6 Nixon v. Verry, 29 Ch. D., 196.

in connection with the seller's lien and right of stoppage in transit, and will be found explained under the relevant sections.

(9) "Mercantile Agent."

Mercantile agent: definition.

"Mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

This definition is taken from section 1 (1) of the English Factors Act, 1889, and is in fact the same except that the word "his" is omitted before the word "business". In view, however, of the words which immediately follow, "as such agent," the omission does not seem to make much practical difference.

Before 1889, under the repealed Factors Acts in England, the terms used were simply "person" or "agent" entrusted with the possession of, goods, but it was held that the Acts only applied to mercantile transactions, and that the term "person" or "agent" did not include a mere servant or caretaker, or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponded to that of some known kind of commercial agent like that class (factors) from which the Acts took their name[1]. Thus, a person entrusted with furniture to keep in her own house for the plaintiff was held not to be an "agent" within the meaning of the Acts[2]; and a wine merchant's clerk who, as such, was possessed of delivery orders. was held not to be an agent within the meaning of the Acts, so as to be able to make a valid pledge in fraud of his master[3]. It was further held, that if a mercantile agent received goods in some other capacity, the Act did not apply; for instance, where goods were warehoused with a warehouseman who was also a broker, it was decided that he could not pledge them in his capacity of broker[4].

Mercantile agency exists although the agent is acting for one principal.

Under the present Act, in *Lowther* v. *Harris*[5] the plaintiff had a quantity of valuable furniture, including some tapestry, which he wished to sell, and accordingly arranged with one Prior to act as his agent for its disposal. Prior by fraud obtained possession of some of the tapestry, which was at the plaintiff' house, and sold it to the defendant and absconded with the money. The defendant had acted in good faith. The point for decision arose whether Prior was a mercantile agent and it was held that he was. The learned Judge observed—"Various objections have been raised. It was contended that Prior was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman[6]. I think this is still the law under the present Act.

1 Cole v. North Western Bank (1875), L. R. 10 C. P. 354, at pp. 372, 373; City Bank v. Barrow (1880), 5 App. Cas. 664, at p. 678; see Chalmers, Sale of Goods Act, 11th Ed., p. 172.

2 Wood v. Rowcliffe (1846), 6 Hare 183.

3 Lamb v. Attenborough, (1862), 31 L.J. Q. B. 41, at p. 42; cf. Oppenheimer v. Attenborough, (1908), I. K. B. 221 at p. 226 C. A.

4 Cole v. North Western Bank (1875) L. R. 10 C. P. 855, Ex. Ch.

5 (1927) 1 K. B. 393, 398.

6 Cole v. North Western Bank (1875) L. R. 10 C. P. 554, 372; Lamb v. Attenborough (1862) 1 B. & S. 831, Heyman v. Flewker (1863) 13 C.B. (N. S.) 519, U. Ulaiman v. The Ywet. 1934 Rang. 198=151 I. C. 413.

In my opinion Prior, who had his own shops and who gave receipts and took cheques in his own registered business name, and earned commissions, was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent, he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman* v. *Flewker*[1], and I think the same is the law under the present Act. In *Weiner* v. *Harris*[2] it appears that the agent was not acting for any other principal than the plaintiff, and this was also in *Hastings, Ltd.* v. *Pearson*[3], in respect of which case the Court of Appeal in *Weiner* v. *Harris*[2] held that the agent was a mercantile agent. It is also clear that pictures as objects of purchase and sale, constitute those who deal in them on commission mercantile agents within the Factors Acts. *See* under the old Act *Heyman* v. *Flewker* and under the present Act *Turner* v. *Sampson*[4] "

In *Heyman* v. *Flewker*[1], it was held that a mere insurance agent who on a particular occasion was entrusted with pictures to sell on commission and who fraudulently pledged them with a pawnbroker, was an "agent entrusted with the possession of goods" within section I of the Act of 1842 (5 & 6 Vict. C. 39) on the ground that the character of the employment in the particular instance corresponded to that of a factor. "The term agent does not include a mere servant or caretaker, or, one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name."

The authority of a mercantile agent is determined by the course of business customary with that agent. It cannot be limited by private instructions from the principal[5]. Lord Alverstone, C. J. said: "When you are dealing with a person who is a mercantile agent you have to find whether in the customary course of his business as such agent he has authority to sell, etc."

The mercantile agent thus does not mean the agent duly authorised under the Civil Procedure Code or under other enactments, but a person who has not been appointed by any particular formality, but by the confidence reposed in him by his master, and who by his ordinary behaviour and course of dealing is treated as a mercantile agent by the majority of persons in the market—a person, whom a reasonable businessman would, by course of dealing and commercial usage take to be, and treat as a representative of the principal.

The chief classes of mercantile agents are factors, brokers and auctioneers.

1 (1863) 13 C. B. (N. S.) 519, 134 R. R. 629.
2 (1910) 1 K. B. 285 C, A.
3 (1893) 1 Q. B. 62.
4 (1911) 27 T. L. R. 200
5 Oppenheimer v. Attenborough, (1908) 1 K. B. 221=77 L. J. K. B. 209.

Use of the expression "mercantile agent" in the Act.

The expression "mercantile agent" occurs in sections 27 and 30 of the Act. It is also used in section 178 of the Indian Contract Act as amended by section 2 of the Indian Contract (Amendment) Act, 1930. The difference, however, between the language of this sub-section and of that of the proviso to section 27 of the Act is to be noted. In that section "a" mercantile agent has been substituted for "such" mercantile agent. This sub-section deals only with the status of the agent in relation to his principal, defining the circumstances in which he obtains his authority from the principal; while proviso to section 27, concerns the rights of third parties who deal with him, In the first case there is the question of his actual authority; while in the second case it refers to his ostensible authority. The question is fully discussed under section 27.

(10) "Price"

"Price" means the money consideration for a sale of goods[1].

The definition of "price" is taken from section 1 of the English Act. "Price", according to this definition, must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter[2].

The "price" of a thing is its agreed or estimated value expressed in terms of the currency of the country. "The technical term which has been invariably adopted for the numerical expression of the values of commodities, is "price"[2]. Price means coin or money to be given in return of the property purchased[3]. The acceptance of a Hundi, however, operates as payment of price, though it may be only conditional.[5] According to Allahabad High Court money means and includes not only coin but also bank notes, Government Promissory notes, bank deposits and otherwise generally any paper obligation or security that is immediately and certainly convertible into cash so that nothing can interfere with or prevent such conversion[6].

See also notes under section 4 of the Act.

(11) "Property"

"Property" in the Act means the general property in goods and not merely a special property.

This definition is the same as in the English Sale of Goods Act; 1893 (section 62). In law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general and the other a special property in it. For instance, when

1 See Emp. v. Appana, 9 Mad. 141; Kedar Nath v. Emp., 30 Cal. 921.
2 Harrison v. Luke (1845) 14 M. &. M. 193; see also Samaratmal, v. Gonril, 25 Bom. 699; Mitchell v. Gile, 12 N. Hamp. 390.
3 See Chalmers p. 37.
4 Volkart Bros. v. Vettivelu, 11 Mad. 459.
5 Kuttayan Chetty v. Pallaniapp Chetty, 27 Mad 540
6 Reference by Board of Revenue, 3 All. p. 793

goods are delivered in pawn or pledge, the general property remains in the pawner, which[1] he may transfer to a third person subject to the rights of the pawnee, and a special property is transferred to the pawnee[2]. The same applies to the case of a bailee.

In *Jenkyns* v. *Brown*[3] a factor in New Orleans bought a cargo of corn with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own order, and endorsed and delivered them to a banker to whom he sold bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

Again, the right of property in goods must be distinguished from the right to their present possession. The right of property may be in one person, while the right to possession may be in another as in the case of a lien[4]. So, too, property may be divided between owners, but the right to possession may be in one alone[5] and where there is a sale of specific goods for cash, the property passes by the contract but the seller may (unless otherwise agreed, retain the goods till the price is paid. Again, goods may be sold which are in the possession of a third person, such as a carrier or warehouseman, who has no property in the goods, but has a right to return them till his charges are paid.[6]

What we are concerned here in connection with the sale of goods is the general property or ownership or dominium in the goods and not merely a special property or a mere right of possession or retention. What passes by sale here is its absolute ownership and nothing short of it.

See the distinction between general and special property discussed in *Sewell* v. *Burdick*[7] and see in particular sections 18 to 26 of the Act which require this definition.

(12) "Quality of Goods"

Quality of Goods includes their state of condition.

This definition is the same as in the English Act (section 62). The word "includes" shows that the definition is not exhaustive. The expression is used in sections 16 and 17 of the Act and is of considerable importance in construing the words "merchantable quality" in section 16. For instance, as cited by Chalmers[8], 'flour or tobacco may be of excellent kind, but if it is damaged may not be merchantable'.

The distinction between the "description" of goods in the contract (section 13), and their quality has been pointed out by Lord Dunedin in *Manchester Liners* v. *Rea*[9] wherein he has observed:

1 Franklin v. Neate (1844) 13 M & W. 299; 11 L. J. Ex. 59, 67 R.R. 683.

2 Halliday v. Holgate (1868), L. R. 3 Ex. 299; Harper v. Godsell (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185.

3 (1849), 14 Q. B. 466; 19 L J. Q B. 286; 80 R. R. 287.

4 Mulliner v. Florence (1878), 3, Q. B. D. 484 C. A.; Milgate v. Kebble (1841), 3 M. & Gr. 100; Chalmers, Sale of Goods Act, 11th Ed., p. 161; Pollock on Possession. p. 120.

5 Nyberg v. Handelaar (1892) 2 Q. B. 202, C A; The Odessa, (1916) A. C. 145

6 See Chalmers, Sale of Goods Act, 11th Ed., p. 162.

7 (1884) 10 A. C. 74.

8 See Chalmers, Sale of Goods Act. 11th Ed, p. 161.

9 (1922) 2 A. C. 64, at p 80

"The tender of anything that does tally with the specified description is not compliance with the contract. But when the article tendered does comply with the specified description, and the objection on the buyer's part is to the quality above, then I think section 14 (1) (corresponding to section 15 (1) of the Indian Sale of Goods Act) settles the standard, and the only standard by which the matter is to be judged."

(14) "Specific Goods"

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made.

The definition in the English Act is the same as in the Indian Act. The Act necessarily distinguishes specific or individualized goods from "generic" or "unascertained goods" i.e., goods defined only by description[1]. Where there is a contract for specific goods the seller would not fulfil his contract by delivering any other goods than those agreed upon. When there is a contract for generic goods the seller fulfils his contract by delivering at the appointed time any goods which answer to the description in the contract.

The term "specific goods" is not indentical with "ascertained goods". It does not certainly mean goods which have been examined by the buyer.

To be specific the goods must be actually identified; it is not sufficient that they are capable of identification, In *Kursell* v. *Timber Operators.*[2] there was sale of uncut timber defined to be "all trunks aud branches of trees, but not seedling and young trees of less than six inches in diameter at a height of four feet from the ground", the timber to be cut not more than twelve inches from the ground, the purchasers having fifteen years inwhich to cut the timber. *Held*, that the contract was not a contract for the sale of specific goods within section 18 (1) of the English Act (corresponding to section 20 of the Indian Act), that the goods were neither identified nor agreed upon that the timber was not in a deliverable state until the purchasers had severed it; and that therefore, the property in the timber did not pass when the contract was made.

In borderline cases it is not always easy to distinguish between specific and ascertained or generic goods. There may be a mixed case, for instance, where certain goods are specified and agreed upon to be sold but there is something to be done by the seller with respect to them, or where there is a contract for the sale of an unascertained portion of a large ascertained quantity of goods. They are 'specific goods' for certain purposes while they are not such for other purposes. For instance, the property in them does not pass until the seller has done that something with them or has ascertained the portion sold from the stock/while if the goods are destroyed before such act or ascertainment the seller may be discharged from his obligation.

1 See Lal Chand Deep Chand v. Baij Nath Jugal Kishore, A.I.R. 1937 Cal. 140

2 (1927) 1 K.B. 298 (C. A.); 95 L. J. K. 562, following Morison v. Lockhart, (1912) S. C. 1017.

In Re Wait[1] by a contract of November 20, 1925, Wait bought 1,000 tons of wheat of a particular description "*ex Challenger*" expected to load in December at Oregon.On the following day he resold 5000 tons of this quantity to sub-purchasers. The wheat was shipped in bulk on December 21, and a bill of lading for the 1,000 tons was sent to Wait and received by him on January, 4, 1926. On February 5, the sub-purchasers, without having raceived any documents and before any appropriation of the 500 tons, paid Wait for the 500 tons. Wait paid the money to his bank and hypothecated the bill of lading for the 1,000 tons and became bankrupt before the ship arrived. Wait's trustee in bankruptcy redeemed the bill of lading and claimed to retain the whole 1,000 tons. The Divisional Court, reversing the County Court Judge, held that though, for want of appropriation, the property in the 500 tons had not passed to the sub-purchasers, the 500 tons were "specific" goods within section 52 of the English Act) corresponding to section 58 of the Indian Act), and the court had jurisdiction to order specific performance of the contract. The Court of Appeal reversed this decision, holding that the 500 tons were not specific or ascertained goods within that section : and further, that there never was any such *appropriation* or *identification* of, or obligation to deliver, a particular 500 tons as to create an equitable assignment giving the sub-purchasers a beneficial interest in or a lien in respect of the 500 tons.

Again, suppose a man having a hundred dozen of a particular brand of champagne in his cellar, agrees to sell twenty dozen of the champagne of that brand "now in my cellar." For some purposes this would perhaps be regarded as a contract for specific while for other purposes it would be regarded as a contract for the sale of unascertained goods. The property in the wine would not pass till the twenty dozen has been appropriated to the contract, but if the whole of the wine were destroyed the seller might be discharged from his obligation[2].

The whole of a goods in an identified bulk may, however, be specific goods for this purpose, even if they are not separated from other goods or weighed[3]. In this case a sale of stock of hay, only hay clear of mould to be delivered, was held to be a sale of specific goods.

Goods which are not specific goods for the purpose of passing the property or giving the buyer a remedy in specific performance may be treated as specific goods for the purpose of sections 7 and 8 of the Act.

As regards *unasecrtained goods* the maxim *genus nunguam perit* would apply. "Specific" includes the unascertained product of what is specific, and is not confined to actually existing goods. In *Howell* v. *Coupland*[4], a sale of 200 tons of potatoes to be grown on the land of the seller was treated as a sale of specific goods for the purpose of avoiding the contract upon the potatoes per-

1 (1927) 1 Ch. 606 C. A.

2 See Hayman v. M' Lintock (1907, 9 F. (Ct. of Sess. 936; Chalmers, sale of Goods Act, 11th Edn. p. 163

3. Eldon v Hedley Bros., (1935) 2 K.B.I. C.A.

4 (1876) 1 Q. B. D. 258. C. A.

ishing from blight before the risk had passed to the buyer "It may be argued that a case of this character falls not under sections 6, and 7 of the Sale of Goods Act, 1893 corresponding to sections 7, 8 of the Indian Sale of Goods Act 1930) but under section 2 (2) of the Act (corresponding to section 6 of this Act), as under the general common law doctrine of impossibility of performance, which is preserved by section 61 (2), corresponding to section 66(1) (e) of this Act, but the practical result seems to be that, so far as the perishing of such goods is concerned, sale of an unidentified portion of an identified bulk is governed by the principles laid down in sections 6 and 7 of the Sale of Goods Act, 1893[1] "

"Future goods," even though particularly described, do not seem to come within the definition of specific goods, but for most purposes would be subject to the same considerations as unascertained goods, *See* notes to sections 19 to 24[2].

The term "specific goods" occurs in sections 7, 8, 13 (2), 19, 20, 21, 22 and 58 of the Act.

(15) "Expressions used but not defined in the Act."

This sub-section lays down that 'expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act', References will be found to such expressions wherever these occur.

Application of provisions of Act X of 1872.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

Application of provisions of the Indian Contract Act, 1872-relation of the Indian Sale of Goods Act, 1930, to general law of contract.

This section lays down that the unrepealed provisions of the Indian Contract Act, 1872, *save in so far as they are inconsistent with the express provisions of this Act*, shall continue to apply to contracts for the sale of goods. The Indian Sale of Goods Act, 1930. deals only with those rules of law which are peculiar to the law of sale of goods. Section 3 of the Act read with section 66 of the same clearly indicates that this Act would form merely a Chapter in a Code relating to law of contract, as it did specifically in the Indian Contract Act, 1872, before its enactment and the remaining provisions of the Indian Contract Act which contain the general rules of the law of contract and the rules relating to special contracts other than those relating to sale of goods remain in tact and are applicable to cases arising under this Act unless their application is inconsistent with some express provisions of this Act. Thus the rules as to validity of contract, the capacity of parties to make a contract, etc., will equally govern contracts for the sale of goods. And in case of breach of a contract, the measure of damages will be that indicated generally in sections 73 and 74 of the Indian Contract Act.

1 Halsbury, Laws of England, 2nd Edn., vol. XXIX, p. 20.

2 See Chalmers, Sale of Goods Act, 11th Edn., p. 163.

It was observed by the Special Committee on this point: "Though the Chapter on the sale of goods has been taken out of the Indian Contract Act, the Bill will form part of the general law of contract. We have, therefore, provided in this clause that the general provisions of the Indian Contract Act shall continue to be applicable to contracts of sale of goods in so far as they are not inconsistent with the special provisions of the Bill[1]."

The object of the saving provided by this section is two-fold: (1) it emphasizes the fact that the law of sale of goods is only a branch of the general law of contract, and (2) it fills up any *lacuna* in this Act by resorting to the provisions of the Indian Contract Act[2].

A similar provision is made in S. 61 (2) of the English Act in the following words :—

"The rules of the common law including the law relating to merchants save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion mistake or other invalidating cause shall continue to apply to contracts for the sale of goods".

It may be convenient to refer briefly to some of the provisions of the Indian Contract Act in so far as they relate to the contract of sale

Capacity of parties to contract.

One of the requisites of a valid contract is that there must be due capacity to contract on the part of the persons entering into the contract, It is presumed in law that every person is capable of contracting, and if exemption from liability is claimed on the ground of incapacity to contract, such incapacity must be strictly proved. Section 11 of the Indian Contract, 1872, prescribes that 'every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject'. Section 12 of the same describes what is sound mind for the purposes of contracting[3]. The liability of persons incompetent to contract, such as minors and persons of unsound minds to pay for necessaries actually supplied to them is governed by section 68 of that Act[4].

Section 2 of the English Sale of Goods Act, 1893, specifically deals with capacity of parties to contract and runs as follows:—

1 Report of the Special Committee (Appendix C).

2. See Chalmers, p, 163
Books Miamship Co. v. Cargo Fleet Iron Co. (1916) 2 K.B. 570, C.A.

3 Section 12 of the Indian Contract Act, 1872, runs as follows:—
"12 A person is said to be of unsound mind for the purpose of making a contract if, at the time when he makes it he is capable of understanding it and of forming a rational judgment as to its effect upon his interest.
A person who is usually of unsound mind, may make a contract when he is of sound mind
A person who is usually of sound mind but occasionally of unsound mind, may not make a contract when he is of unsound mind."

4 Section 68 of the Indian Contract Act, 1872, is to the following effect:...
"If a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

"2. Capacity to buy and sell is regulated by the geteral law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract he must pay a reasonable price therefor.

'Necessaaies' in this section mean goods suitable to the condition of life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

There is nothing in the Indian Sale of Goods Act, 1930, corresponding to section 2 of the English Act though sections 11, 12 and 68 of the Indian Contract Act, 1872, seem to cover those provisions.

Capacity to contract distinguished from authority to contract.

Capacity to contract must be distinguished from authority to contract. 'Capacity means power to bind oneself; authority means power to bind another. Capacity is part of the law of status; authority is part of the law of principal and agent. Capacity is usually a question of law; authority is usually a question of fact"[1].

Minors

Two of the important classes of persons who suffer from incapacity to contract are the minors and the lunatics. In England before the passing of the Infants' Relief Act, 1874 at common law there were but two classes of contracts which though made by an infant were as valid as though made by a person of full age; namely, contracts for necessaries and (in certain cases) contracts for the infant's benefit. In all other cases common law treated an infant's contracts as being voidable at his option and these were further divided under two heads:—

(a) Contracts which were valid and binding on the infant *until he disaffirmed them*, either during infancy or within a reasonable time after majority;

(b) Contracts which were not binding on the infant *until he ratified them* within a reasonable time after majority

One of the effects of the Infants' Relief Act, 1874, was that contracts for goods supplied, except for necessaries, became void. And section 2 of the Sale of Goods Act, 1893, further declared the liability of infants to pay a reasonable price for necessaries sold and delivered to them.

In India, the Indian Majority Act, 1875 (Act IX of 1875-section 3) prescribes the age of majority as 18 which is extended to 21 where a guardian has been appointed to the minor under the Guardian and Wards Act, 1890 (Act VIII of 1890). What is the nature under the Indian law of a contract entered into by a person incompetant to contract? Is it void or voidable?

There is no explicit answer to this question in the Indian Contract Act. Section 11 of that Act simply states that 'every person is competent who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.' The former current of Indian decisions was that, as under the English law, a

1 See Chalmers, Sale of Goods Act, 11th Ed., p. 15.

minor's contract is only voidable at his option[1]. In 1903 the point came for decision before the Judicial Committee of the privy Council in *Mohri Bibi* v. *Dharmdas Ghose*[2] in which it was held that a mortgage made by a minor is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entiled to repayment of the money under sections 64 and 65 of the Indian Contract Act on a decree being made declaring the mortgage invalid. It is therefore now settled law that an infant's contract, under the Indian law, is absolutely void and therefore there is no possibility of ratification by the infant on coming of age[3].

Lunatics.

A lunatic or *non compos mentis* is one who has had understanding but, by disease, grief, or other causes has lost the use of his reason. Under the English law the contract of a lunatic or of an insane person is held to be voidable. It was held in *Imperial Loan Co.* v. *Stone*[4], the leading case on this point: "When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether is it executory or executed, as if he had been sane when he made it unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about." Lopes L. J. observed : "A defendant who seeks to avoid contract on the ground of the insanity must plead and prove not merely his incapacity but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

The above principles were applied in the case of *Broughton* v. *Snook*[5].

A lunatic, even though he has been found insane by inquisition, is not on that account incapable of contracting: the validity of the contract depends on the knowledge which the other party may be shown or reasonably supposed to have possessed, of the state of mind of the insane person. But in this case the burden shifts and the other party should prove that the contract was made during a lucid interval[6].

The Indian law on the subject does not hold such a contract voidable but declares it to be void. Section 12 of the Indian Contract Act, 1872, defines a person of ***sound mind*** as follows :

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests:"

Now, until the Privy Council decision in *Mohri Bibi's* case

1 See Sashi Bhushan v. Jadu Nath (1885) 11 Cal. 552 : Haumant v. Jayarao (1888) 13 Bom. 50 ; Mohammad Arif v. Saraswati (1891) 18 Cal. 259 ; Contra per Norris J. Fatima v. Debnauth (1893) 20 Cal 508.

2 (1903) 30 Cal. 539 , L.R. 30 Ind. Ap. 114.

3 See Indran Ramaswami v. Anthappa (1906) 16 M. L. J. 422 ; Arumugha v. Duraisingha (1914) 37 Mad. 38. See to the contrary Kundan Bibi v Sree Narayan, (1906) 11 C. W. N. 135 where the learned Judges did not notice the Privy Council ruling cited above.

4 (1892) I. Q. B. 599, p. 601.

5 (1938) 1 A.E.R. 411

6 Hall v. Warren (1804) 32 E.R. 738 ; 7 R. R. 306; Snook v. Watts (1848) 50 E. R. 757 ; 83 R.R. 122: See also Re Walkar (1905) 1 Ch. 150.

referred to above, it was held by the Courts in India that a lunatic's contract was like infant's contract, voidable, but in view of that ruling it naturally follows that a lunatic's contract must also be void in Indian law. Where, however, a person supplies necessries for a lunatic, he is entitled to be reimbursed out of the property of the lunatic under the provisions of section 68 of the Indian Contract Act.

Contracts are not in general affected by the subsequent insanity of one of the parties[1]. There may, however, be circumstances showing an implied condition excusing the party from performance in such a contingency, as for instance, a contract to marry will become void by the insanity of one of the parties[2].

Mental deficiency-drunkenness

Under the English law it has been held that a person who makes a contract while in a state of intoxication may subsequently avoid the contract, but if it is confirmed by him it is binding on him.[3] In Indian law the contract of a drunken person will be void. Illustration (*a*) to section 12 of the Indian Contract Act reads :

"A sane man who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effects on his interest, cannot contract whilst such delirium or drunkenness lasts."

meaning of "necessaries"

To the general rule that a person, incapable of entering into a contract, cannot enter into a valid contract, there is an exception, namely, that if such a person or any one whom he is legally bound to support is supplied by another person with ***necessaries*** suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person:[4]

As regards supply of goods to a minor or to a person who by reason of mental capacity or drunkenness is incompetent to contract, in the English Act, as we have already seen, 'necessaries' mean goods suitable to the condition of life of the person incompetent to contract, ***and to his actual requirements at the time of the sale and delivery.*** In an action against such a person the onus is on the plaintiff to prove both that the goods supplied were suitable to the condition in life of the defendant and that the defendant was not sufficiently supplied with goods of that class at the time when they were delivered, not merely at the time when the contract was made, and it is immaterial whether the plaintiff did or did not know of the existing supply.[5] In this case clothes to the value of £150, including eleven fancy waistcoats were supplied by a tailor to an infant undergradnate at Cambridge, The definition of "necessaries" in the English Act is declaratory of the common law[6]. It was ruled by Baron Parke in ***Peters*** v ***Fleming***[7] that from the earliest time down to the present, the word 'necessaries' is not confined in its strict sense to such articles as were necessary to support life, but extended to articles fit to maintain the particular person in state, degree and station in life in which

1. Re. Pagani (1892) 1 Ch. 236, Owen v. Davies (1747) 26 E. R. 905
2. Durham v. Dhurham (1885) 10 Pr. D. 80.
3. Mathews v. Baxter (1873) 8 Ex. 132
4. S. 68, Indian Contract Act, 1872.
5. Nash v. Inman (1908) 2 K. B. I. C. A; See also Ryder v. Wombwell. (1868) L. R. 4 Ex. 32.
6. See Ryder v. Wombwell (1868) L. R. 4 Ex. 32; Johnstone v, Marks (1887) 19 Q. B. D. 509. approving Barnes v. Toye (1884) 13 Q. B. D. 410.
7. 6 M. & W. 42.

he is ; and therefore we must not take the word "necessaries" in its unqualified sense but with qualification as above pointed out.[1] To put the matter concisely, "necessaries" means goods suitable to the condition in life of dependent and to his actual requirement at the time of the sale and delivery, and whether an article supplied to an infant is necessary or not depends upon its general character and upon its suitability to the particular infant's means and station in life. It must further be observed that as necessaries include every thing necessary to maintain the infant in the state, station, or degree of life in which he is, what is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular infant ; articles therefore that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries where the usages of society render them proper for a person in the rank of life in which the infant moves. The infant's need of things may also some times depend upon the peculiar circumstances under which they are purchased and the use to which they are put. For instance, articles purchased by infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles might not be so considered[2]. "Necessaries", however must be things which the minor actually needs ; therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use; they will not be necessary if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not[3]. Objects of mere luxury cannot be necessaries, nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessaries[4].

Section 68 of the Indian Contract Act refers to "necessaries" suited to condition in life of the person incapable of entering into contract only and does not refer to the question of actual requirement of such person at the time of the sale and delivery. It has, however, been held under this section also that though an article may belong to class of things that are unquestionably necessary, and though the particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of necessaries in that particular case. It is thus incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case, the purchaser had need of it, for if the infant did not require it the

1 Ryder v. Woombell, L.R., 3 Ex. Ch. 90.

2 See Jenner v. Walker, 19 L. T. N. S. 398 in which it was ruled that wedding presents for the bride of the infant may be necessaries. To the same effect are the decisions in Juggesur v. Nilambar, 3 W.R. 217 and Mokundi v. Sarabsukh, 6 All. 417: referred to in Jagan Ram v. Mahadeo, 36 Cal 768 ..18 C. W. N. 643.

3 Johnstone v. Marks (1887) 19 Q. B. D. 509, followed in Jagan Ram v. Mahadeo Prasad (1909) 36 Cal. 768; Daw Nyun v. Maung Nyi Pu, A. I. R. 1928 Rang. 359-178 I. C. 680, Previous English cases were conflicting, but the point may now be taken as settled.

4 The classicial English authority is Ryder v. Wombwell (1868) L. R. 4 Ex. 32.

seller cannot recover it. When he assumes the business of a guardian for the purpose of present relief, he is bound to execute it as a prudent guardian would and consequently make himself acquainted with his necessities and circumstances. The credit which the infant's necessities give him ceases when these necessities cease, and as nothing further is requisite when these are relieved, the exception to the rule is at an end[1].

It is essential that the necessaries supplied should be suited to the condition in life of such person[2] and the burden of proving the necessity for the goods supplied is on the person who seeks to make the property liable[3]. When no inquiry was made at the time when the goods were supplied as to the necessity, the plaintiff is not debarred from proving that the goods were necessary[4].

It will be observed that the minor's property is liable for necessaries, and no personal liability is incurred by him, as it may be under English law[5]. Under English law the liability is not on the express promise, if any there be, the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied. He cannot bind himself to pay for them, but it is for his benefit that he should have them, and the law will therefore see that a fair price is paid therefor, which is not necessarily the stipulated price. The obligation to pay arises *re* and not *consensu*[6]. The word used in section 68 of the Indian Contract Act is "reimbursed', and this also appears to connote payment of fair price for the necessaries supplied as in the English Act.

'Necessaries" include necessaries supplied to one whom a person, incapable of entering into a contract, is legally bound to support.

It is to be noted that under section 68 of the Indian Contract Act, the property of a person incapable of entering into a contract is not only liable to be utilized for reimbursing a person who has suppplied necessaries to such person suited to his condition in life, but also for necessaries supplied to any one whom such person is legally bound to support. Thus an infant may marry and so he may make himself liable for necessaries supplied to his family[7]. Again, where the law casts a duty on the minor to provide for the marriage expenses of female member the marriage expenses of a sister of such a minor fall within "necessaries"[8].

Payment of goods, even though they be necessaries, if they are not supplied, cannot be enforced either in an action for the price or for damages for non-acceptance; and nothing can be recovered in respect of goods which are not necessaries, even

Jagan Ram Marwari v. Mahadeo, 36 Cal. 768.

Sadasheo v. (Firm) Hiralal, A. I. R. 1938 Nag. 65-175 I. C. 149; Daw Nyun v. Maung Nyi Pu, A. I. R. 1938 Rang. 359.

Sadasheo v. (Firm) Hiralal, 1938 Nag. 68; Sadasheo v. Sunder Govind, 1938 Nag. 68=175 I. C. 494. Hira Singh v. Sunder Singh, 1930 Oudh 299.

Umrao v. Banarsi, 1927 Lah. 414=101 I.C. 702.

See also Ram Chandra v. Hari, A. I. R. 1936 Nag. 12.

6 Re Rhodes (1890) 44 Ch. D.C.A. 94 at pp. 105-107; Nash v. Inman (1908) 2 K. B. I. at p. 8 C. A.

7 Chapple v. Cooper (1844), 13 M. & W. 252, at p. 259.

8 See Nandan v. Ajudhia (1910) 32 All. 325-5 I.C. 413; Shrinivasa Rao v. Babu Ram, 1933 Nag. 285=145 I. C. 350; Jai Indra Bahadur v. Mst. Dilraj Kuar; 1921 Oudh 1=31 I.C. 278; Ramajoyayya v. Jaganathan, (1919) 42 Mad. 18=49 I.C. 872.

though supplied and actually used. It is also essential that the necessaries supplied should be suited to the condition in life of the person incapable of entering into a contract.

Under the English law a racing bicycle has been allowed as a necessary for an infant getting 21 shilling a week[1], but cartridges, and jewellery for a girl he was courting were held not to be necessaries for an infant with an income of £7 a week[2]. As observed, "articles of utility are sometimes allowed[3]".

A supply of plough bulls to an infant ryot has been held to be "necessaries" within the meaning of section 68 of the Indian Contract Act[4].

False representation by a minor as to his age-restitution of fraud.

In *Khan Gul* v *Lakha Singh*[5] the questions referred to a Full Bench of Lahore High Court for decision were in these tems: (1) Whether a minor, who by falsely representing himself to be a major, has induced a person to enter into a contract, is estopped from pleading his minority to avoid the contract.

(2) Whether a party, who, when a minor has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuses to perform the contract and at the same time retain the benefit he may have derived therefrom.

Held, (1) where an infant has induced a contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though section 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act delaring a transaction entered into by a minor to be void.

(a) (*Per Full Bench, contra Harrison, J*—A party, who when a minor has entered into a contract by means of a false representation as to his age, cannot, whether he be defendant or plaintiff, in a subsequent litigation while refusing to perform the contract, claim to retain the benefit he may have derived therefrom[6].

In this case plaintiffs brought a suit for possession of half a square which had been sold to them by defendant I for Rs. 17,500 out of which Rs. 8,000 had been paid in cash before the Sub-Registrar and Rs. 9,500 were secured by a promissory note payable on demand from the plaintiffs. Defendant I refused to deliver possession and the plaintiffs prayed that possession of the property sold might be delivered to them, or, in the alternative, that a decree for Rs. 17,500 the consideration money, together with interest might be passed against the other property of defendant I. Defendant I pleaded minority.

Sir Shadi Lal, C. J. observed: "The court has to look at the substance, and not at the form of the action; and

1 Clyde Cycle Co. v. Hargreaves (1898), 78 L. T. 296.

2 Hewlings v. Graham (1901), 70 L. J. Ch. 568.

3 Chapple v. Cooper (1840), 13 M. & W. 252, at p. 258.

4 Sriniwasa v, Balasubramania Odayar,—A. I. R. 1926 Madras 592=94 I. C. 534.

5 A. I. R 1928 Lah. 699=9 Lah. 701=111 I. C. 175;

6 Leslie v. Sheill, (1914) 3 K. B. 607, not approved; Balak Ram v. Dadu, 76 P. R. 1910 and Kapura v, Hardit Singh—A. I R. 1923 Lah. 510 referred to.

if it finds that the action is in reality an action *ex contractu* but disguised as an action *ex delicto* it would decline to enforce the claim Indeed, it has been repeatedly held in England that when an infant has induced a pe son to contract with him by making a false statement that he was of full age, the infant is answerable either for the breach of the contract or for damages arising from the tort committed by him.

"But a representation by an infant that he was of full age gives rise to an equitable liability. The court, while relieving him from the consequences of the contract may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however. debatable : if the benefit acquired by him consists of money which is not earmarked, has the court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former ? The equitable jurisdiction is found upon the desire of the court to do justice to both the parties by restoring them to the *status quo ante*, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced." Tek Chand, J. observed : "In ordering restitution the court is not enforcing a void contract but is restoring the parties to the *status quo ante*.. ... This is in accord with equity, justice and good conscience and appears to have been recognized for a long by the courts in England."

It is well established under the English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant[1]". In *Stocks* v *Wilson*[2], an infant who had obtained furniture of the value of £100 on a fraudulent representation that he was a major. subsequently sold the furniture for £ 30. The court held that the infant cannot better his position by putting it out of power restore the articles brought and directed refund of the £30.

The limits within which this principle of restitution for fraud will be applicable in England, was pointed out in *Leslie* v. *Sheill*[3]. In this case an infant borrowed £400 on a fraudulent representation that he was a major. The money-lender sued for the return of the sum of £400. The trial court gave a decree on the principle that the infant must restore the property obtained by fraud. Or, in other words, if an infant, under a fraudulent misrepresentation as to his age, purchases goods on credit, he is liable in equity, on attaining full age, to account for money received by disposing of the goods. Load Sumner distinguishing ***Stocks* v. *Wilson*[2] *observed:—***

1 Jennings v. Rundall (1799) 8 T. R. 335, 4, B. B. 680.

2 (1913) 2 K. B. 235.

3 (1914) 3 K. B, 607 ; Cowern v. Nield (1912) 2 K. B. 419.

"No doubt if the infant has obtained property by fraud he can be compelled to restore it; but it is a different thing to say that if he has obtained money, he can be compelled to refund it. Here, the money was paid over in order to be used as the defendant's own and he has so used it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud; nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think, this will be nothing but enforcing a void contract......when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains....... but scrupulously stopped short of enforcing against him a contractual obligation...... Restitution stopped where a payment began."

The above two cases show that if the infant retains possession of the property obtained by him by misrepresentation or in a case of money lent, has purchased any property with such money or has invested the money in a bank, he can be compelled to restore the property or the money: but, where the infant has spent the money, no direction for restoration can be made for it will amount to virtually enforcing the contract against the infant. It seems that, on equitable principle, if an infant, by a fraudulent repreentation of this kind, procures a loan on mortgage of his lands or goods he may be obliged under the equitable jurisdiction of the court to repay what is owing as a condition of his invoking the assistance of the court to declare the invalidity of the mortgage or to recover possession of the property mortgaged or the title deeds thereof[1].

The Full Bench ruling of the Lahore High Court cited above (*Khan Gul* v. *Lakha Singh*) clearly seems to indicate that as far as the law relating to goods is concerned the equitable doctrine of restitution applies also and the minor can be compelled to restore any advanatge obtained by him by fraud, but not so as to repay any money borrowed which cannot be identified[2].

Lunatics.

The ignorance of the other party that he was dealing with an infant is no answer to the plea of infancy, but in the case of a person *non compos mentis* in order that the plea of lunacy may succeed in England it is necessary that the other party should be aware of the infirmity at the time of making the contract[3]. Under the Indian law the contract of such a person is, however, void and it would seem that the ignorance of the other party of his condition is immaterial[4].

Conversely, it has been held under English law, that, where an infant has contracted to sell goods and has received the price but not delivered the goods, or has delivered goods of an inferior quality, he cannot be sued either for damages or for the return of the price as money had and received,[5] and the effect of this rule cannot be avoided by framing the action *ex delicto*[6].

Enforcing of a cont-

In England an infant or other person incapable of entering into a contract may enforce a contract and the seller will be liable if he

See Thurstan v. Nottingham etc. Building Soceity, (1902) 1 Ch. 1, 12; Lodge v. National Union Investment Co., Ltd. (1907) 1 Ch. 300.
See also Harimohan v. Dulu Miya=A. I. R. 1935 Cal. 198= (1934) 61 Cal. 1075
Imperial Loan Co. v. Stone (1892) 1. Q. B. 599, C. A.
See Molyneux v. Natal Land Co. (1905) A. C. 555 (P. C.).
Cowern v. Nield, (1912) 2 K. B. 419.
Leslie v. Shiell, (1914) 3 K. B. 607, C.A.

ract by or against a minor.

refuses to deliver goods which he has contracted to sell in an action brought by such a person. Under Indian law such contracts are void and not merely voidable, and it seems that a contract of sale cannot be enforced against the abuit seller. No specifie performance can be had either by or against a minor[1]. Specific performance being an equitable remedy, it is not granted unless there is mutuality *i.e.* reciprocal right in both the contracting parties to seek specific performance[2].

An infant seller, however, is not liable on a trading contract[3]. As to an infant seller setting aside a sale of immovable property which he had brought about by fraudulently representing that he was of full age, see *Appaswami Ayyanger* v. *Narayanswami Ayyar*[4].

Contracts completed.

It appears that where a contract has been completely performed and the goods delivered and paid for, the transaction must stand. In *Pearce* v. *Brain*[5] an infant exchanged his motor cycle and side-car for a second-hand car and when the second-hand car broke down, sued for the return of the motor cycle. The court held he was not entitled to relief. In *Valentini* v. *Canal*[6] an infant hired a house and furniture for £102, paid £68 in cash and gave a note for the balance. He used the furniture for some months and filed a suit for the repayment of £68 paid by him and for a declaration that the note given by him for the balance was unenforceable on the ground of infancy. The contract was declared void by the court and the note was ordered to be returned but the court refused to direct the return of the sum paid by the infant. This appears to be the law in India also.

For further details on the subject of 'capacity of parties to contract' see commentaries on the Indian Contract Act, 1872.

Illegal contracts.

Section 23 of the Indian Contract Act, 1872, states that every agreement of which the object or consideration is unlawful is void. It further states that the consideration or subject of an agreement is lawful, unless

it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law ; or
is fraudulent ; or
involves or implies injury to the person or property of another ; or

the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful.

1 Mir Sarwarjan v. Fakruddin, 39 I. A. 1=(1912) 39 Cal. 232; Srinivasa Thathacharlu v. Neelamma [1920] M. W. N. 340=55 I. C, 436.
2 See observations in Zebunnissa Begum v. Mrs. Danagher A. I. R. 1936 Mad. 564=54 Mad. 492=163 I. C. 384.
3 Cowern v. Nield (1912) 2 K. B. 419.
4 A. I. R. 1930 Madras 945, (1931) 54 Mad. 112=129 I. C. 51.
5 (1929) 2 K. B. 310.
6 (1890) 24 Q. B. D. 166; See also Corpe v. Overton—(1833) 131 E. R. 901: 38 R. R. 422; Steinberg v. Scala, (1893) 2 Ch. 452; Hamilton v. Vaughan-Sherrin Electrical Engineering Co. (1894) 3 Ch. 589, at pp. 593—4.

Section 24 of that Act reads as follows :—

" If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

Immoral or illegal contracts

A contract for the sale of an obscene or libellous book or picture or print is unenforceable. The sale of a thing in itself an innocent article of commerce is void when the seller sells it, knowing that it is intended to be used for an immoral or illegal purpose, for "*no man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them*[1]. A man who sells arsenic to one who he knows intends to poison his wife with it, will not be allowed to maintain an action upon his contract.

In *Bowry* v. *Bennet*[2] a prostitute was sued for the value of clothes furnished and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. It was held that it must not only be shown that the plaintiff had notice of this but that he expected to be paid from the profits of the defendant's prostitution and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.

This decision was cotsidered in *Pearce* v. *Brooks*[3] in which the plaintiff had supplied a brougham to a prostitute, who pleaded in the action that the brougham was hired for the purpose of her trade, as the plaintiff knew, and in the expectation by the plaintiff that the hire of the brougham would be paid out of the receipts of her trade. The plaintiff knew the defendant to be a prostitute but there was no direct evidence that he knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation ; and there was no evidence that plaintiff expected to be paid out of the wages of prostitution. It was held that it was not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; that the knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorised in *inferring* that the plaintiff also knew the purpose for which she wanted the brougham ; and that this knowledge was sufficient to render the contract void.

These two cases show that where goods such as ordinary clothing which have no special connection with the trade or character of a prostitute are supplied, some evidence of a direct furtherance by the seller of the buyer's immoral purpose must be shown. The degree of knowledge possessed by the seller is only evidence of this. If knowledge of the buyer's purpose be expressly shown such evidence is conclusive proof of the furtherance of an illegal object : where it is to be inferred from the circumstances of the case it may or may not be sufficient. And the nature of the goods supplied is material to show whether the seller should or should not be fixed with knowledge[4].

1 Per Eyre C. J. in Lightfoot v. Tenant, (1796) 1 B. & P. 551, 556, 4 R. R. 735, 737.

2 1 Camp. 338; 10 R. R 697.

3 L. R. 1 Ex. 212; 35 L. J. Ex. 134: followed in Upfil v. Wright (1911) 1 K. B. 506, where a flat was let to a kept mistress.

4 See Benjamin on Sale, 7th Edn., B. K. III Ch. IV p. 523.

In the case of an illegal contract the seller cannot be sued for failure to deliver the goods, nor if he has delivered them can he recover the price. The rule is that a party to such a contract cannot come into a Court of Law and ask to have his illegal object carried out ; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim ; and this rule holds although neither party had any intention of breaking the law. The rule is expressed in the maxim ' *in pari delicto potior ert conditio defendentis*'[1].

But where a person has been induced to enter into an illegal contract by fraud or strong pressure he may be relieved of such a contract. In *Reynell* v. *Sprye*[2] Sir Thomas Reynell was induced, by the fraud of Sprye, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail ; but the court was satisfied that he had been induced to enter into the agreement by the fraud of Sprye, and considered him entitled to relief.

Thus, as a genral rule moneys paid under an illegal contract by one party to the other cannot be recovered unless the plaintiff can show that he is not *in pari delicto* with the defendant[3]. The same principle is applicable to a defence. Where the parties are not *in pari delicto*, as when a buyer buys goods, innocent in themselves but for an unlawful object, unknown to the seller, the buyer cannot defend himself by pleading his own illegal purpose, for, as observed by Lord Mansfield in *Montefiori* v. *Montefiori*[4] "no man shall set up his own iniquity as a defence any more than as a cause of action". It follows from this that an innocent seller may repudiate contract on discovering buyer's illegal object before it is completed or while it is still executory and a person will not be assisted in suing on a contract with an illegal object that a seller who has contracted to supply goods, which the buyer in fact wants for such an object, may on discovering the facts and without any liability refuse to deliver the goods. In *Cowan* v. *Milbourn*[5] Milbourn let set of rooms to Cowan for certain days ; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful, he refused, and was held entitled to refuse to carry out the agreement.

A contemplated unlawful or immoral use of property (including money) to be obtained under a contract as an unlawful object, and this whether such use is part of the bargain or not, and whether the party supplying the property is to be paid out of the profits of its unlawful use or not. If both parties know of the wrongful or immoral intention, the agreement is void ; if the party who is to furnish the property does not know of it, the contract is voidable at his option

1 See Anson's Law of Contract, Part II, Chapter VII; Harse v. Pearl Life Assurance Co., (1904) I. K. B. 558.

2 1 D. M. & G. P. 660; see also Atkinson v. Denby, 6 H. & N. 778; 7 H. & N. 934

3 Harse v. Pearl Life Assurance Co., (1904) 1 K. B. 558; 73 L. J. K. B. 373, C. A.

4 (1762) Urn. Bl. 363; Cf. Fergusson v. Norman (1838) 5 Bing. N. C. 76, 50 R. R. 613, where the defendant who alone had been guilty of illegal conduct was unable to set up a lien against the assignees in bankruptcy of the owners of the goods.

5 (1867) L. R. 2 Ex. 230

when he discovers the other party's intent. This is a well settled principle of law[1].

If the innocent party to the contract discover the illegal purpose before it is carried into effect, it would seem that he could not recover on the contract if he allowed it to be performed. If the parties are *in pari delicto,* the party sued may rely on illegality. "The court does not sit to enforce illegal contracts. There is no question of estoppel : it is for the protection of the public that the court refuses to enforce such a contract[2]. Whether the illegality of the contract is brought to the notice of the Court by the plaintiff or defendant or otherwise, the court will not give its assistance to the plaintiff if his claim is founded on that illegality. In *Taylor* v. *Chestor*[3] the plaintiff failed to recover the half of a £50 bank-note deposited with the defendant to secure a debt due from the plaintiff to the defendant for wine and supplied to the plaintiff by the defendant in a brothel kept by her.

Property may pass under an illegal contract of sale. The maxim is *in pari delicto potior ert conditio possidentis vel defendentis.* The court will not assist either of the two parties. Thus property in goods sold under an illegal contract may pass[4] and if in addition the goods have been delivered, the buyer's title is indefeasible, for there is no person who can impeach it though the buyer cannot be sued for the price. As observed by Parke, B., in *Scarfe* v. *Morgan*[5] *:* 'If the illegal contract is executed, and a property, either general or special has passed thereby, the property must remain. Accordingly, it will be recognised as against a third person, who has wrongfully interfered with it in any case where the plaintiff does not require to set up this illegal contract as the foundation of his right[6]. In *Feret* v. *Hill*[7] the plaintiff brought ejectment to recover possession of premises from whom he had been elected by the defendant, the lessor. The plaintiff, at the time of the agreement intended to use the premises as a brothel, and had induced the defendant to make the agreement by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises. *Held,* that he could recover, on the ground that the misrepresentation was one of fact *collateral* to the agreement.

Object prohibited by law.

An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the Legislative or a principle of unwritten law. But in British India, where the criminal law is codified acts forbidden by law seem practically to consist of acts, punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature[8].

1 Pragilal v. Ratan Lal A. I. R. 1931 All. 458=131 I. C. 546; Shahbuddin Sahib v. Venkatachalam, A. I. R. 1938 Mad. 911; Alexander v. Rayson, (1936) 1 K. B 169
2 Re Mahmoud & Ispahani (1921) 2 K.B. 716, 729 per Scrutton L. J.
3 (1869) L. R. 4 Q. B. 309
4 Elder v. Kelly (1919) 2 K. B. 179; 88. L. J. K. B. 1253.
5 (1838) 4 M. & W. 270, at p 281.
6 Gordon v. Chief Commissioner of Police (1910) 2 K. B. 1080; 70 L. J. K. B. 957, C. A.
7 (1854) 15 C.B. 207; 23 L.J.C.P. 185; 100 R. R. 318:
8 See Pollock & Mulla's Indian Contract Act, 7th Edn, P. 138,

The thing sold may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly sold for the purpose, prohibited by law, of adulterating food or drink. The contract would be void in this case. Thus, under the English law where a statute, as a revenue regulation and to protect the public health, prohibited brewers from using or causing to be used any ingredients but malt and hops in making beer, it was held that a druggist who sold drugs to a brewer, knowing the illegal object to which they were applied, could not recover the price[1]. In *Law* v. *Hodson*[2] a statute provided a penalty for every sale of bricks of less than a certain size. It was held that a seller who had contravened its provisions could not recover the price of the bricks.

A contract for the sale of goods entered into in contravention of a statutory provision, whether the prohibition be express, or be merely implied from the imposition of a penalty, cannot be enforced by action[3]. Although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purpose of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law[4]."

Under the English law it has been held that if the object of the statute is merely .to protect the revenue it well not be held to prohibit the enforcement of a contract in cases where there has been a breach of the statute. Thus where a seller had not complied with a statute requiring him to take out a licence and to have his name painted on his place of business under a penalty, it was held that he could maintain his action for the price of goods sold[5]. But if the object of the statute, either wholly or in part, is the protection of the public from possible fraud, or the promotion of some object of public, the inference is that contracts made in contravention of its provisions are prohibited[6]. The principle has been thus stated by Pollock :

"When conditions are prascribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; (but they) are valid if no specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e g. , the convenient collection of the

1 Langton v. Hughes (1813), 1 M. & S. 593.
2 (1809), 11 East, 300.
3 Cundell v. Dawson (1847), 4 C. B. 376.
4 Mellis v. Shirley Local Board (1885), 16 Q. B. D. 446, Lord Esher, M. R., at pp. 451, 452.
5 Smith v. Mawhood (1845), 14 M. & W. 452; and see Bailey v. Harris (1849), 12 Q. B. 905.
6 Victorian Daylesford Syndicate v. Dolt, (1905) 2 Ch. 624; Brightman v. Tate, (1919) 1 K. B 463; Re Mahmoud and Ispahani (1921) 2 K. B. 716; see also Chitty on Contracts, Chapter XIII.
7 Pollock, Principles of contract. 11th Edn., p. 275.

The above principles have been followed in India also[1]. In *Ramanayndu* v. *Seetharamayya*[2] a Full Bench of the Madras High Court held that a partnership between the holder of an *abkari* licence and a stranger would be illegal without the permission of the Government and the advances made by the stranger could not be recovered. *Raghunath* v. *Nathu*[3] related to transfer of a licence for the sale of opium, and *Ismalji* v. *Raghunath*[4] was a case of assignment of a lease regarding salt, and in both cases, the contract was held unenforceable, because under the guise of a sub-lease, an act which was forbidden byl aw was contemplated.

Wagering contracts.

Section 30 of the Indian Contract Act, 1872, provides as follows: —

"Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

A wager is a promise to give money or money's worth, upon the determination or ascertainment of an uncertain event ; the consideration forsuch a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way.

'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature, that is to say, if an event turns out one way, A will lose, but if it turns out the other way he will win[5].'

In *Sukhdeva dass Ramprasad* v. *Govindass*[6] the suit was for the recovery of Rs. 62,000 being the value of 400 bales of yarn alleged to have been purchased by the defendant. The defendant's plea was that the plaintiff and the defendant were only wagering on the difference in prices in the yarn market. It was in evidence that the 100 bales sold by the plaintiff to the defendant were sold by the defendant to A, and by A to B and by B to B and so on, till the last purchaser sold it back again to the plaintiff and thus the chain became complete. It was also in evidence that delivery orders called *Patta Patties* changed hands from the plaintiff to the defendant, from the defendant A, and so on till they came back to the plaintiff. The Judicial Committee observed :

"There can be no doubt that these various contracts were in character highly speculative : but .. ..that is insufficient in itself to render them void as wagering contracts.........To produce that result there must be proof that the

1 See Bhikanbhai v. Hiarlal(1900) 24 Bom. 622; Abdulla v. Mammod (1902) 26 Mad. 156; Gauri Shankar v. Mumtaz Ali (1879) 2 All. 411 (F. B.) etc. Abdullha vAllah Diya A. I. R. 1927 Lah' 33?=100 I. C. 846; Bhagwant Genuji v. Gangabisan, A. I. R. 1940 Bom. 369=191 I.C. where the authorities are reviewed. 806

2 A. I. R. 1935 Madras 440=58 Mad. 727 (If agreement for partnership made previous to getting licence, partnership is legal---Satyala v: Bhogavalli= A. I. R. 1935 Mad. 895=158 I.C. 1055.

3 (1895) 19 Bom. 626; See also notes in Pol'ock and Mulla's Indian Contract Act, 7th Edn., pp. 138 to 151.

4 (1909) 33 Bom. 636=3 I. C. 779.

5 Per Cotton L. J. in Thacker v. Hardy (1878) 4 Q. B. D. 685; see also Richards v. Starck (1911) 1 K. B. 296; Forget v. Ostigny (1895) A. C. 318; Rameshwar Das v. New Jooria Bazar Sugar Co.= A. I. R. 1926 Sind 202=941. I. C. 371; Per Jenkins C. J. in Sassoon v. Tokersey (1904) 28 Bom. 616, at p. 621.

6 (1928) 51 Mad 86=56 I. A. 32=A.I.R. 1928 P. C. 30=107 I. C. 29; see also Mul Chand v. Kanhaiya Lal=A. I. R. 1929 All. 134=1121 I. C. 791 Rangasa v. Hukum Chand=A. I. R. 1930 Nag. 111=120 I. C. 496.

contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable".

To constitute a wagering contract, Hawkins J., lays down three tests (1) the intention to gamble must be common to both parties ; (2) each party must be liable to win or lose according to the event ; and (3) the parties should have no interest in the contract except the money or other stake[1].

In *Thacker* v. *Hardy*[2], the defendant had employed the plaintiff, a broker, to buy and sell for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts but the plaintiff was so to arrange matters that nothing but "differences" should be actually payable to or by the defendant. The plaintiff accordingly entered into contracts on the defendant's behalf, thereby making himself by the rules of the Stock Exchange personally liable and sued the defendant for commission and for indemnity against his liability. *Held*, by the Court of Appeal that the agreement was not a wagering contract within the English Gaming Act of 1845, and that the plaintiff could recover.

In the above case the first element was wanting. The contract was one of mandate to the plaintiff to make real contract with the jobbers, and this contract was not a wagering contract, as the plaintiff had no interest in the event, which determined the defendant's loss, but looked only to his commission.

In *Hirst* v. *Williams*[3], where the plaintiff subscribed to a financial operation conducted by the defendant, on the terms that if certain stocks went up, the plaintiff would be entitled to the profit, and if no profit resulted, to a return of his subscription, the transaction was held by the Court of Appeal not to be, as between the plaintiff and the defendant, a gaining and wagering contract within the Act of 1845, on the ground that the transaction was in effect an advance, towards the defendant's own speculations of money, which the defendant agreed to repay.

Commercial transactions and wagers.

The third test may be illustrated by a contract of sale of goods to be delivered at a future date at the market price of the date of delivery. Here by the contract the parties may respectively win or lose according to the determination of a future uncertain event *i.e.* the future market price, but neither of them is in the position of "having no other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration", for the contract is *ex hypothesi* a genuine contract for the sale and delivery of the goods, the determination of the future uncertain event merely ascertaining the price[4].

1 Carlill v. Carbolic Smoke Ball Co. (1892) 2, Q. B. at pp. 490—492.
2 (1878) 4 Q. B. D. 685 at 692, 695.
3 (1895) 12 T. L. R. 128 (C. A.) But C. F. Richards v. Starck, (1911) 1 K. B. 296, where Channell J. held that the loss of the interest on his money was sufficient loss to make the contract a gambling one. Hirst v. Williams was not referred to.
4 Benjamin on Sale, 7th Edn., p. 563; See also Thacker v. Hardy, (1878) 4 Q. B. D. 685 at pp. 692, 696.

Mutual intention is essential to make a wagering contract, and therefore if one party intends to make a valid contract and to deliver or accept the goods, as the case may be, at the agreed time, it will not be a void contract, even though to his knowledge the other party may have entered into it as a pure speculation without any prospect of being able to pay for or deliver the goods should the speculation turn out unfavourably. "If the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as, if agreed in by the other, would make the contract a wagering one, while those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one"[1].

It is not a wagering contract when both parties intend to deliver and accept the goods, whether at a price fixed by the contract, or at a price dependent on the market price on the date of the delivery of the goods, though each is aware that he may suffer a severe loss or reap a large profit, according as prices may rise or fall between the date of the making of the contract and the date fixed for its completion[2].

"In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences"[3]. It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. "Contracts are not wagering contracts unless it be the intention of *both* contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other".[4]

It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transation, but a wager on the rise or fall of the market".[5] In this case the plaintiff was a rice trader; the defendants were rice millers, having a small mill capable of putting out 30,000 bags in a month. During seven weeks in June, July, and August, 1899, the defendants entered into several contracts with the plaintiff for the sale to him of 199,000 bags of rice at various prices, aggregating upwards of five crores of rupees, and the latest delivery was to be on 7th October, 1899

1 Per Hawkins J., Carlill v. Carbolic Smoke Ball Co. (1892) 2 K. B. 484 at p. 491; Ironmonger v. Dyne (1928) 44 T. L. R. 417, C A.; Weddle Beck & Co. v. Hackett (1929) 1 K. B 321; Kanwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan (1923) 7 Lah. 442=A. I. R. 1926 Lah. 318=94 I. C 394; Venkataratnam v. Hanumanta Rao=A. I. R. 1935 Mad. 135=156 I. C. 651.

2 Barnett v. Sanker (1925) 41 T.L.R. 660

3 Ram Krishna Das v. Mutsaddi Lal A. I. R. 1942 All. 170; Chimanlal Purshottamdas Nyamatrai, A. I. R. 1938 Bom. 44=173 I. C. 205; Sukhdeodoss v. Govinddoss, A. I R. 1928 P. C. 30. Perosha v. Manekji, (1898) 22 Bom. 899, 903.

4 J. H. Tod v. Lakhmidas (1892) 16 Bom. 441, 445. 446; Ajudhia Prasad v. Lalman, (1902) 25 All. 38; Sassoon v. Tokersey (1904) 28 Bom. 616; Rangasa v. Hukamchand. (1929) 120 I. C. 406.

5 Kong Yee Lone & Co., v. Lowjee Nanjee. (1901) 28 I.A. 239 at p. 244; 29 Cal. 461, 467.

The rice was to be delivered from amongst a number of specified mills, in which the defendant's mill was not included. In the same year, by fourteen contracts, ranging in time from January to the end of August, the defendants sold to the plaintiff 22,250 bags of rice, to be delivered from the defendants' mill. The latter contracts were all duly fulfilled by delivery and payment. None of the former contracts were performed, and the defendants passed to the plaintiff a promissory note for "difference on rice". In a suit upon the note it was held by the Recorder of Rangoon that there was no common intention to wager and that the plaintiff was entitled to succeed. The judgment was reversed by the Privy Council on appeal, on the ground that the consideration for the note was a number of wagering contracts within the meaning of section 30 of the Contract Act. Their Lordships observed: "Now the out-put of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they (defendants) had dealings with other persons besides the plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundredfold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact, they never completed nor were they called on to complete, any of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared, the one class suitable to traders, such as the defendants, and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment the rational inference is strengthened into a moral certainty", Similarly, in *Doshi Talakshi* v. *Shah Ujamsi Velsi*[1] certain contracts were entered into in Dholera for the sale and purchase of Broach cotton, a commodity which it was admitted, never found its way either by production or delivery to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The course of dealings was, however, such that none of the contracts was ever completed except by payment of differences between the contract price and the market price in Bombay on the *Vaida* (settlemant) day. It was held upon these facts that the contracts were by way of wager within the meaning of section 30 of the Contract Act. Jenkins C. J. said: "Here in each the contract was made at Dholera, between men of Dholera, and under the rules of Dholera, and from the evidence we know that the witnesses who have been called have not been able to indicate with certainty or even to suggest, with one doubtful exception, a single instance since the formulation of those rules in 1892 in which any one of the numerous contracts similar to that with which we are now dealing has been completed otherwise than by payment of differences. Is it an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without

1 (1899) 24 Bom. 227.

any intention of performing them otherwise than they have consistently and without exception been performed, that is to say, by payment of differences? In my opinion that is the reasonable and natural inference to be drawn; it agrees with the experience of the past: and it represents the actual results in the particular instance we are now considering."

On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This infrequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contract with each other, nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed.[1]

As regards *teji mandi* transactions, at the present time the presumption is that these are not mere wagering transactions.[2]

The subject is fully discussed in Pollock and Mulla's 'Indian Contract and Specific Relief Acts' and may be referred to.

Construing of a contract.

It is to be observed that in construing a contract with a view to determining whether it is a wagering one or not, the court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words, in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language, which on the face of it, if words were only to be considered, might constitute a legally enforceable contract"[3].

Contract of sale at an uncertain price is also to be distinguished from wager, as will be explained under sections 4 and 6 of the Act.

Smuggling—infringement of revenue laws.

At common law smuggling contracts are also illegal. When a party in England sent an order to Guernsey for goods, which were delivered there by the seller in half ankers,[4] ready slung, for the purpose of being smuggled into England, the court held that the plaintiffs, who were Englishmen, residing here, and partners of the seller in Guernsey, were not entitled to recover[5].

If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the smuggling, the English Courts will not refuse to assist him to recover the price[6].

In *Waymell* v. *Reed*[7], the goods were sold, and delivered

1 See Pollock & Mulla, p. 220.

2 See Narandas S. Rathi v. Ghanshamdas A. I. R. 1933 Bom. 348 and other authorities cited at p. 225 of Pollock and Mullah's Indian Contract Act, 7th Edn.

3 Carlill v. Carbolic Smoke Ball Co. (1892) 2. Q. B. at pp. 491—492. See also Grizewood v. Blone (1851) 11 C. B. 526; Universal Stock Exchange v. Strachan (1896) A. C. 166.

4 Shipment of foreign spirits in vessels containing less than 60 gallons was illegal.

5 Briggs v. Laurence (1789) 3 T. R. 454; I. R. R. 740; See also Clugas v. Penaluna (1791) 4 T. R. 466; 2 R. R. 442.

6 Holman v. Johnson, 1 Cowp. 341; Pellecat v. Angell, 2 C. M. and R. 311; 4 L. J. Ex. 326.

7 5 T. R. 599; 2 R. R. 675.

abroad, and the foreign plaintiff invoked the decision in *Holman* v *Johnson*[1], but was not permitted to recover, because it was found that he had aided the purchaser in his smuggling purposes by packing the goods in a particular manner, so as to evade the revenue.

In *Pellecat* v. *Angell*[2], on facts similar to those in *Holman* v. *Johnson*[1], the following principles were laid down: That where the foreigner himself breaks the revenue laws of England, as by taking an actual part in the illegal adventure, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with knowledge that the buyer intends to smuggle them into England, is not illegal and may be enforced.

Opinions have differed as to the reasoning of the court in *Pellecat* v. *Angell*. In many of the subsequent decisions it has been approved though by some authorities it has been adversely criticised[3] on the grouud that "no man ought to furnish another with the means of transgressing the law knowing that he intended to make that use of them".

The matter was considered recently in *Foster* v. *Driscoll*.[4] There a financier, a distiller, a firm of shipbrokers and another made arrangements to load a ship with a cargo of whisky to be carried across the Atlantic and to be sold in the United States, if that were possible, or if not, in Canada or on the high seas at some point whence it could be smuggled into the United States in violation of the laws of that country. It was held by a majority of the Court of Appeal (Lawrence and Sankey, L. JJ.) that the object of the agreement being breach of international comity, the agreement was contrary to public policy and void. In this case stress was laid upon the fact that the American law intended to the infringed was not a mere revenue law. Sankey, L. J., very strongly observed: "An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them in joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country, notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."

On the analogy of the English law referred to above the rules applicable to India appear to be as follows:—

(1) If all the parties are subject to Indian law and privy to the illegal purpose, the contract cannot be enforced by the Indian Courts.

(2) If the contract involves smuggling goods into India and is to be completed by delivery of the goods in India, the Indian law governs the contract as the place of performance of it is India and it cannot be enforced, even though the seller

1 (1775), 1 Cowp. 341.
2 2 C. M. & R. 311; 4 L. J. Ex. 326; 41 R. R. 723.
3 See Benjamin on Sale, 7th Ed., pp. 526 and 527.
4 (1929) 1 K. B. 470 (C. A.); 98 L. J. K. B. 282

be a foreigner, assuming that he was privy to the illegal purpose.

(3) If the contract were both made abroad and completed abroad and the foreign seller actively aided the purchaser to carry out his illegal purpose of smuggling goods into India, he cannot recover under it[1].

(4) But where the contract is made and completed in a foreign country and the foreign seller has not done anything in the way of furthering the illegal purpose, though he might be aware of the intention of the purchaser to smuggle them, he can sue for recovery[2].

(5) Where the performance of a contract infringes the revenue laws only of a foreign state but its performance is not illegal according to the law of India, the court will not take notice of the revenue laws of the foreign state[3].

(6) But if the contract is to be performed in a foreign country and performance involves infrignement of the law, other than the revenue laws, of that country, the illegality by the foreign law can be pleaded in defence to an action brought for non-performance in an Indian Court[4].

See also under the heading 'Conflict of Laws' in Appendix.

Contracts with foreign enemies.

"It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitant of the enemy's country, that such intercourse except with the licence of the crown is illegal[5]."

It is under this principle that at common law a contract of sale between a British subject and an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the Sovereign[6], and cannot be enforced even after the conclusion of peace[7]. And where an executory contract (including one between a British subject and a neutral) involves in its performance trading or intercourse with the enemy it is dissolved on both

1 See Clugas v. Penaluna (1791) 4 T. R. 466, 2 R. R. 442; Waymell v. Reed (1794) 5 T. R. 599, 2 R. R. 675.

2 See Holman v. Johnson (1775) 1 Cowp. 341; Pellecat v. Angell (1835) 2 C. M. and R. 511, 41 R. R. 723.

3 See Pellecat v. Angell (1835) 2 C. M. and R. 311, 41 R. R. 723 and British and Foreign Marine Insurance Co. v. Sanday (1916) 1 A. C. 650, 672 "illegality according to the law of a foreign country does not affect the merchant" when performance of the contract does not itself involve an infringement of that law.

4 See Ralli Brothers v. Compania Naviora Satay Aznar (1920) 2 K. B. 287, C. A.; See also Foster v. Driscoll (1929) 1 K. B. 470, C. A. reviewing the cases on this subject.

5 Esposito v. Bowden (1857) (in Ex. Ch.) 7 E. and B. 763, 779, 27 L. J. Q. B. 17, 110 R. R. 822, 823; Kershaw v. Kelsey, 100 Mass., 561; and see per Lord Dawey [1902] A.C. at p. 499.

6 See Brandon v. Nesbitt (1794), 6 T.R 23; 3 R.R. 109; Potts v. Bell (1800), 8 ibid 548; 5 K. R. 452 (Ex. Ch.).

7 Willison v. Patteson (1817), 7 Taunt. 439; 18 R. R. 525.

sides by the declaration of war[1]. Nor can an alien enemy during war enforce a contract made before the war; his rights are suspended until the conclusion of the war but revives when peace is declared. But he may, in such a case, be sued by a British subject, and may then appear and contract his defence[2]. Thus if goods are sold and delivered by a German firm to an English firm before war no action for the price can be maintained during the war.[3]

A clause in the contract suspending the contract for the duration of the war between the countries of the parties is void as against public policy, as tending to advantage of the enemy's country and to the detriment of this[4].

The same prohibition attaches to the citizens of an allied state as upon the subjects of a belligerent state.[5]

With reference to civil rights, the test of "alien enemy" is not nationality, or domicile, but the place of residence or business[6]. Thus British subject, or a neutral, voluntarily residing or carrying on business in hostile territory, is regarded in this connection as an alien enemy, as adhering to the king's enemies. Conversely the subject of a hostile state is not an alien enemy if he neither reside nor carry on business in the enemy's territory[8].

And if he be in this country by permission of the crown, he is *sub protectione regis*, and in the same position as an alien friend[9]. So, also, is the subject of a neutral state, who, while engaged in the service of the enemy, has been taken prisoner of war, for his temporary allegiance to the enemy is determined by his capture[10].

A contract between two subjects of a neutral state to export contraband of war to a belligerent is lawful, and may be enforced in the courts of the neutral state[11].

Agreements in restraint of trade.

Section 27 of the Indian Contract Act, 1872, dealing with this subject reads as follows:—

"Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent, void.

1 Esposito v. Bowden (1887), 7 E. & B. 763; Ertel Bieber & Co. v. Rio Tinto Co., (1918) A. C 260: 87 L. J. K. B. 531 Abdul Razack v. Khandi Row (1917), 41 Mad. 225=49 I. C. 851.

2 See Benjamin on Sale, 7th Edn., p. 525 and the cases cited therein.

3 Wolf & Sons v. Carr. Parke & Co., (1915) 31 T.L.R. 407 C.A.

4 Ertel Bieber & Co. v. R. Tinto Co., [1918] A.C. 260.

5 The Panariellos (1915), 85 L.J.P. 140: 112 L. T. 777.

6 Per Lord Lindley in Janson v. Driefontein Consolidated Mines, (1902) A C. 484, at 505; 71 L.J.K B, 857; Porter v. Freudenburg (1915) 1 K.B. 857 (C.A.) 84 L.J.K.B. 1001, See The Daimler Co. v. The Continental Tyre Co., (1916) 2 A.C. 387, as to a British registered company under enemy control, which gives it enemy status.

7 McConnel v. Hector (1802), 3 B. & P 113, 6 R.R. 724.

8 Per cur, in Porter v. Freudenburg supra : Re Mary Duchess of Sutherland (1915) 31 T.L.R. 248.

9 Caseres v. Bell (1799), 8 T.R. 166; Porter v. Freudenburg. supra ; Johnstone v. Pedlar, (1921) 1 A. C. 262 (P.C.); 90 L.J.P.C. 181.

10 Sparenburgh v. Bannatyne (1997), 1 B. & P. 163. 4 R.R. 772 : See Benjamin on Sale, 7th Edn., pp. 524 and 525.

11 Chavasse, Exparte grazebook: In re; 34 L. J. Bk. 17 The Helen35 L.J. Adm. 2; L.R. 1 Adm. Addison's Law of contracts, 11th Edn p, 103 (B.K.I. Chap. III Sect. I)

Exception:—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein.

Provided that such limits appear to the court reasonable, regard being had to the nature of the business."

Under the English law, a covenant or promise in a contract of sale, by terms of which either party is unreasonably restrained in the carrying on of his trade, is against public policy, and is void. Originally, any agreement restraining an individual from carrying on a lawful profession or trade was considered to be absolutely void at common law. This was laid down as long ago as the Year Book of 2 Henry V[1], where a bond given by one John Dyer, the condition of which was that he should not use the dyer's craft for half a year, was held void. *Colgate* v. *Bacheler*[2] was an action of debt under an obligation, the condition being that defendant should not "either as apprentice or servant, or for himself as master or otherwise, use the trade of a haberdasher within the county of Kent, the cities of Canterbury or Rochester." The court held that "this condition is against law to prohibit or restrain any to use a lawful trade at any time or at any place for as well as he may restrain him longer times and more places, which is against the benefit of the commonwealth : for being freemen it is free for them to exercise their trade in any place".

In course of time, however, the severity of the common law doctrine was in its working felt as a great hardship. The rigid rule was based on the theory that the welfare of the state required that the skill, intelligence and enterprise of every individual should be at the disposal of the public. It was subsequently experienced that as a result of it traders were unwilling to take apprentices, because every apprentice was a prospective rival, and he could not, after the apprenticeship was over, be restrained from carrying on a competing trade or business. Likewise, persons who had carried on a business for a long time and wanted to retire were unable to sell their business, there being no inducement to any purchaser to buy as there was nothing to prevent the seller from carrying on a similar business and competing with him.

Doctrine of reasonable restraint.

The rigid common law rule thus relaxed and the view then adopted was that total restraints may be bad but partial restraints would be valid. The most important case on the subject is *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co. Ltd*[3]. In this case a patentee and manufacturer of guns and ammunition sold his business to company, and covenanted that he would not for 25 years, except on behalf of the company, engage directly or indirectly in the business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company. The patentee having entered into an agreement

1 Henry 5.5 b, pl. 26. Benjamin on Sale, 7th Edn., p. 535.
2 Cro. El. 872 ; See also The Ipswich Tailor's case, 11 Co. Cop. 53 a:
3 (1894) A. C. 535; 63 L. J. Ch. 908

with other manufacturers of guns and ammunition, the company brought an action against him to enforce the covenant by injunction. The patentee contended that the covenant as involving a restraint unlimited in space, was *ipso facto* void. Law Macnaughten, L.C., said :

"The true view at the present time, I think, is this, the public have an interest in every person carrying on his trade freely; so as the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, as contrary to public policy, and therefore void. This is the general rule. But, there are exceptions.

Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case.

It is a sufficient justification, and indeed it is the only justification, if the restriction is *reasonable*—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interest of the public.'

In this particular case the court held that the restraint was reasonable and therefore enforceable.

The distinction between general and partial restraint thus disappeared and now the only point is *reasonable*. Accordingly, in *Vancouver Malt & Sake Brewing Co.*, v. *Vancouver Breweries Ltd.*[1]. where the appellants in consideration of a sum of £15,000 undertook not to engage for a period of 15 years in the business of brewing beer and to confine themselves solely to the business of brewing *sake*, the House of Lords held that the burden of proving the agreement to be valid will be on the person seeking to uphold it and the restrictive covenants relied on not only amounted to a purchrase of protection "against mere competition" but were also wide and unreasonable as between the parties.

Indian law

Section 27 of the Indian Contract Act, 1872, is general in its terms and declares all agreements in restraint of trade void *pro-tanto*, except in the case specified in the exception *viz* sale of goodwill of a business. The object appears to have been to protect trade. "Trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained[2]".

The law in India is thus practically the same what the English law was in the beginning. The Indian law makes no reference to the character of the restraint *i.e*, as to its being general or partial, but provides generally that every restraint is bad, unless it falls in the *exception* to this section: It has been observed[3] that section 27 of the Act aims at "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, not contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business."

Reasonable construction must be put upon the section, and not one which would render void the most common form of mercantile

1 (1934) A. C. 181 = A. I. R. 1934 P. C. 101—150 I. C. 32;

2 Per Kindersley J. in Oakes & Co. v. Jackson (1876) 1 Mad. 134, 145.

3 Per Handley J. in Mackenzie v. Striramiah (1890) 13 Mad. 472, 475.

contracts[1]. Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant and there was obligation on the part of the defendant to buy was held not in restraint of trade[2]. Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade[3]. In *Prem Sook* u. *Dhurum Chand*[4] a contract for supply on credit of goods for sale in a particular market containing a stipulation that if the goods were sent by the buyer to any other market a higher rate would be charged, was held not to be in restraint of trade.

On the other hand, if the agreement while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all the produce or any definite quantity, it is in restraint of trade and therefore void. Where twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with R. S. to supply him with combs and not to sell combs to any one else, with an option to R. S. not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta, or else where, the agreement was held void[5].

In *Harbilas* v. *Mahadeo*[6] the defendant agreed to sell a certain quantity of silica sand to the plaintiff and undertook not to sell to four specified factories and pay damages at a certain rate in case of breach, of the undertaking. In a suit for damages on breach, the agreement was construed as one in restraint of trade, even though the actual degree of restriction was not clear from the document.

In a recent case reported as *Abdul Karim* v. *Sheikh Dubar*[7], a contract between A and B requiring B to sell hides only to A and to no body else was held manifestly in partial restraint of B's exercise of his trade and as such void. In this case it was not, however, taken into consideration that there was a legal obligation cast on the buyer to buy and that therefore the restraint was not objectionable and fell within the principles laid down in *Carlisles Nephews & Co.* v. *Ricknauth*, *Prem Sook Dhurewer Chand* and *Sadagopa* v. *Mackenzie* referred to above.

It is settled law that a bare agreement in restraint of competition cannot be upheld. Such an agreement can only be sustained when it is ancillary to some main transaction and is reasonably necessary in the interests of both parties in order to render that transaction effective and is consistent with the interests of the public[8].

There is also nothing in the wording of S. 27 of the Contract Act to suggest that the principle stated therein does not apply when the restraint of trade or business is for a limited period only or is confined to a particular area. Such matters

1 13 Mad. at p. 474
2 Carlisles Nephews & Co. v. Ricknauth Bucktearmull (1882) 8 Cal. 809.
3 Mackenzie v. Striramiah (1890) 13 Mad. 472; affirmed in appeal sub nomine Sadagopa v. Mackenzie (1891) 15 Mad. 79.
4 (1891) 17 Cal. 320.
5 Sheikh Kalu v. Ram Saran Bhagat, (1909) 13 C.W.N. 388=1 I. C. 94.
6 A.I.R. 1931 All. 539=130 I. C. 482.
7 A.I.R. 1937 Oudh 445=170 I.C. 479
8 Premji Damodar v. L. V. Govindji & Co., A.I.R. 1943 Sind 197.

of partial restriction have effect only when the facts fall within the exception to the section[1].

On the whole attempt to invalidate a contract of sale of goods on the ground of restraint of trade is not usually successful. In *Elliman v. Carrington*[2] it was held not to be in restraint of trade for a manufacturer to exact from the wholesale dealer a contract that the latter will not resell below a fixed price, and will also require on a resale a similar contract from the retail trader. In *Palmolive* v. *Freedman*[3] it was held by the Court of Appeal that an agreement not to sell Palmolive soap "howsoever acquired" to the public under six pence a tablet in consideration of being on the plaintiff's wholesale list and allowed their wholesale discount was not injurious to the public.

In one sense every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade, for if A agrees to sell goods to C. he precludes himself from selling to anybody else. But a reasonable construction must be put on section 27 of the Contract Act, and one which would render void most common form of mercantile contracts.[4] Thus, a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade[5]. Similarly, an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade[6]. It is otherwise if the agreement, while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all produce or any definite quantity. In such a case the agreement is bad as being in restraint of trade. Where twentynine out of thirty manufacturers of combs in the city of Patna agreed with R to supply him with combs and not to sell combs to any one else, with an option to R not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta, or elsewhere, the agreement was held void.[7] And where A agreed to purchase certain goods from B at a certain rate for the Calcutta Market, and the contract contained a stipulation that if the goods were taken to Madras, a higher rate should be paid for them, it was held that the stipulation for the higher rate was not in restraint of trade[8].

A contract which creates a pernicious monopoly may, however, be void as against the interests of the public though

1 Khemchand Manekchand v. Dayaldas Bassarmal, A.I.R. 1942 Sind 114, 201 I. C.376.
2 (1901) 2 Ch. 275 ; 70 L. J. Ch 577.
3 (1928) 1 Ch. 267 ; 93 L. J. Ch. 41 (C. A.) See also Connors Bros. Ltd v. Connors. A. I. R. 1941 p. c. 75 (P.C.)
4 Meckenzie v. Striramiah (1890) 13 Mad. 472, at p. 474.
5 Carlislee, Nephews & Co. v. Ricknauth Bucktearmull (1882) 8 Cal 809
6 Mackenzie v. Striramiah (1890) 13 Mad. 472 ; affirmed in appeal subnom. Sadagopa Ramanjab v. Mackenzie, (1891) 15 Mad. 79
7 Shaikh Kalu v. Ram Saran Bhagat ([illegible])3 C. W. N. 388. For "standing offers" R. v. Demers (1900) A.C. 103 prem Sook v. Dhurm chand (1890) 17 Cal. 320.

the onus is on the party alleging and it is heavy especially where the contract is reasonable as between two parties[1].

Such restrictions, moreover, do not bind a sub-buyer from the original buyer, even if he has notice of them, for there is no privity between him and the original seller, and conditions cannot be attached to goods[2] though in the case of patented goods the sub-buyer may be bound by such conditions, but only if he has notice of them[3].

Monopolies

It would seem that the cases which hold that monopolies are opposed to public policy and therefore void under section 28 of the Indian Contract Act are based on the theory of trade being free, in the interests of the community[4]. Grant of a monopoly in favour of a panchayat to sell vegetables in the village was held opposed to public policy and therefore void under section 23 of the Indian Countract Act.

Trade combinations

Another matter for consideration is how far trade combinations and price maintaining agreements will be valid under the Indian Contract Act. Such a thing may arise where two or three rival firms find it more advantageous to combine with a view to maintain the level of prices and one member of such combination violates the agreement. Is it possiblo to enforce such an agreement in a Court of Law ?

An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions is not avoided by this section, and cannot be impeached as opposed to public policy under S. 23 (b). The question whether an agreement whereby manufacturers agree with one another to carry on their works under special conditions, or traders agree amongst themselves to sell their wares at a fixed price, is in restraint of trade has frequently arisen in English Courts. Such agreements have in some instances been disallowed, and in others upheld, according as the restraints were or were not deemed to be in excess of what was reasonably sufficient to protect the interests of the parties concerned.[5] Agreements of this description do not appear to be common in India[6].

In *Haribhai* v. *Sharaf Ali*.[7] the earliest case on the subject four ginning factories agreed to maintain a price level. On reference the court was equally divided in opinion on the question whether such an agreement was in restraint of trade.

1 See Att. Gen of Australia v. Adelaide S.S. Co., (1913) A. C. 781. at p. 796

2 Dunlop Pneumatic Tyres Co., v. Selfridge & Co. (1915)) A. C. 847.

3 National Phonograph Co. of Australia v. Monck (1911) A. C. 336. P.C.

4 See Devi Dayal v. Narain=A.I.R. (1928 Lah. 33=100 I. C. 859, following Somu Pillai v. Municipal Council Mayavaram=(1905) 28 Mad. 205.

5 The law is reviewed by the House of Lords in the recent case of Crofter Hand Woven etc. Co. v. Veitch (1942) A. C. 433, where earlier cases are considered and discussed.

6 See Pollock & Mulla's Indian Contract & Specific Relief Acts, 7th Edn, p. 212.

7 (1897) 22 Bom. 861.

In a later case in *Francier & Co.* v. *Bombay Ice Manufacturing Co.*[1] where four ice factories agreed to maintain the prices. this point again arose but it was not found necessary to decide it though the Judges were inclined to hold that the agreement was enforceable. In a later case reported as *Bholanath* v. *Lachmi Narain*[2], it was however, held by the Allahabad High Court that a combination among traders in a particular place to do business only among their member, paying part of their profits to a common fund and levying fines upon their members for breach of conditions laid down by the combination did not offend against S. 27 of the Indian Contract Act and was not actionable merely because it brought profit to the combination and indirectly damaged their trade rivals. "It is perfectly clear that the defendants did not unlawfully or by illegal means procure any breaches of control in favour of the plaintiffs. There was no conspiracy on the part of the defendants to compel the plaintiffs vendors not to supply goods to the plaintiffs. A certain amount of pressure was brought to bear upon their constituents the object of which was that if the latter wished to continue to be members of the association they had to obey the edicts of the association and to cease to deal with outsiders. These persons had a choice of action. They were not the victims of any coercion on the part of the defendants. Where a person has a choice of one or other of two courses with their attended advantages or disadvantages, coercion is not necessarily one of the elements imvolved in the transaction. There was no organized conspiracy on the part of the defendants to do harm to the plaintiffs. The association of the defendants was formed with the primary object of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs. The association therefore was not unlawful and there was no cause of action for a claim founded upon conspiracy. The plaintiffs are, therefore, not entitled to the relief claimed. An agreement in the nature of a trade combination for mutual benefit for the purpose of avoiding competition is not necessarily unlawful, even if it may damage others.[3] The agreement which was held void in *Sheikh Kalu* v. *Ram Saran Bhagat*[4] was clearly not for the mutual benefit of the parties and was an attempt to create a monopoly.

Price maintenance agreements are valid in English law.[5]

Other cases invalidating the contract.

The general rules relating to fraud and coercion contained in sections 13 to to 19 of the Indian Contract Act apply to contracts of sale as between the immediate parties to the contract, sections 27 to 30 of the Act dealing with complications which arise when rights of third parties become involved.

1 (1915) 29 Bom. 117.
2 A. I. R 1931 All. 83=53 All. 5311 A full discussion of the authorities will be found in the judgment; See also Kuber Nath v. Mahali Ram (1912) 34 All. 587.
3 Daulat Ram v. Dharam Chand, A.I.R. 1934 Lah. 110; 146 I. C. 1030.
4 (1909) 13 C. W.N. 388 cited at p. 73.
5 See Imperial Tobacco Co., v. Parslay (1936) 2 A. E. R. 515

Similarly, an agreement may be avoided on the ground of mistake, on the principles laid down in sections 20 to 22 of the Indian Contract Act[1].

Clause (h) of section 2 of the Indian Contract Act states that 'an agreement enforceable by law is a contract'. As regards the sale and purchase of goods, it is competent for the parties to expressly declare that arrangements made shall impose no legally enforceable obligation on either of them. Such arrangements, therefore, are not contracts; but if goods are actually supplied in pursuance of the terms of such an arrangement, the seller may enforce the payment of the price by an action.[2]

conditions of contract

Assignment of contract of sale.

There is no specific provision in this Act or in the Indian Contract Act which deals with the assignment of contracts of sales; consequently the rules governing the assignability of, and the effects of assigning, a contract of sale depend upon general principles of law. The general rule may be said to be that the burden of a contract may be assigned without the consent of the promisee; but the benfit of a contract assignable if there is no obligation annexed to it, and if no personal qualification of considerations were the foundation of the contract.

Novation must be distinguished from assignment and is a matter of agreement between the parties.

The simplest cases arise where the goods have been delivered and the right to receive the price is assigned, or where, the price having been paid, the right to receive the goods is assigned. The contract may provide for a series of deliveries, or the quantity, quality, or the time of the delivery may depend on the wishes or needs of the parties. All these points will be found discussed in notes under relevant sections of the Act. In any case it is only the benefit of a contract which can be assigned. The assignor cannot get rid of his obligations. The most be can do is to perform them through his assignee, he himself remaining liable[3].

See Scriven Bros. v. Hindley & Co (1913) 3 K. B. 564; Smith v. Hughes (1871) L. R. 6 Q. B. 597: Raffles & Wichelhaus (1864) 2 H. & C. 906, 133 R. R. 853; Bell v. Lever Bros. Ltd. 1932 A.C. 161.

3 See Rose and Frank v. Crompton Bros. [1925] A.C. 445 and notes under section 4 of the Act.

3 See Chalmers, Sale of Goods Act, 11th Edn., p. 12, and commentaries on the Indian Contract Act 1872.

CHAPTER II.

FORMATION OF THE CONTRACT.

Contract of Sale.

Sale and agreement to sell

4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Sale and agreement to sell—meaning.

This section reproduces section 1 of the English Sale of Goods Act, 1893[1] (except for the fact that the latter contains a definition of "price"), and replaces section 77 of the Indian Contract Act[2]. Section 1 of the English Act is declaratory of the common law. The section shows clearly the distinction between a sale (completed sale, as it is sometimes called, or bargain and sale or sale and delivery as used to be called at common law) and an agreement to sell. The word "agreement" in "agreement to sell" is used in the sense of an enforceable agreement or a contract, and not in the sense of an unenforceable agreement as would follow from the definition given in section 2 of the Indian Contract Act.

According to this section, a contract of sale of goods is a contract whereby the seller (a) transfers or (*b*) agrees to transfer the property in goods to the buyer for a price. A contract of sale may be—

1 See Appendix (A).

2 Section 77 of the Indian Contract Act, 1872 (since repealed) reads as follows:—"Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer."

(1) Absolute :

(1) Conditional.

It is *sale* or *executed contract* when under a contract of sale the property in the goods is transferred from the seller to the buyer.

It is an '*agreement to sell*' or *executory contract*, when property does not pass until

(1) some future time, or

(2) subject to some condition thereafter to be fulfilled. An "agreement to sell" becomes a sale

(1) when the time elapses ; or

(2) the conditions are fulfilled subject to which property in goods is to be transferred.

There may be a contract of sale between one part-owner and another.

This section removes the confusion that had been caused by the definition of sale in section 77 read with section 78 of the Indian Contract Act. A contract of sale of goods now clearly includes a mere agreement to sale as well as an actual sale. The Special Committee observed[1]:

"The distinction between a sale and an agreement to sell which was not clear in Chapter VII of the Contract Act has been clearly brought out. The distinction is very necessary to determine the rights and liabilities of the parties to the contract."

Generally speaking, with regard to specific or ascertained goods the property is transferred and sale is completed by offer and acceptance, though the payment of price or delivery, or both, may be postponed, unless the parties clearly express a contrary intention. In the case of unascertained goods the property is not transferred until a latter date, and until then there is no completed sale but merely an agreement to sell.

The question whether the transaction is a sale or an agreement to sell is of some importance. (i) Sale is a contract plus a conveyance, and agreement to sell is a contract. (2) In sale the buyer at once becomes the owner and usually has the risk ; under an agreement to sell the seller remains the owner and the risk is with him (S. 26). (3) On breach of an agreement to sell the buyer has only a personal remedy against the seller. But if after a sale the seller deals with the property as his own (e.g., re-sells them) the buyer apart from his rights *ex-contractu* can sue the seller for conversion. The buyer can also in some cases follow the goods in the possession of third parties. (4) If after a sale the buyer makes default, the seller may sue for the price, but if there is a breach of an agreement to sell. the seller can only sue for damages.[2]

1 Report of the Special Committee (Appendix c.)

2 See Chalmers, Sale of Goods Act, 11th Edn. p. 9 See also Stein Forbes & Co. v. County Tailoring Co., (1916) 86 L. J. K. B. 448

Essentials of a contract of sale—sub-section (1).

The transfer or *agreement* to transfer of ***property*** in a thing from one person to another for a ***price*** constitutes the essence of a contract of sale. It includes a mere agreement to sell as well as an actual sale. Property is defined in section 2 (11) of the Act as meaning 'the general property in goods, and not merely a special property.' 'Price' means the money consideration for a sale of goods.[1]

Seller and buyer must be different persons.

To constitute a contract of sale there must be a transfer or agreement to transfer of property from one person to another, or, in other words, the seller and the buyer must be different persons. Hence it has been said that if a man purchases his own goods there is no sale. Thus if the buyer be already the owner of that which the seller purports to sell to him, the transaction is nugatory. "The parties intended to effectuate a transfer of ownership : such a transfer is impossible : the stipulation is *naturali ratione inutilis*.[2]

It is, however, provided that one co-owner may sell to another and therefore a partner may sell to his firm and a firm may sell to a partner[3]. The position is different in the case of a member of an ordinary club. Where anything the property of a club, for instance, intoxicating liquor or meal, is supplied by the club to a member of the club, who pays for it, the transaction though resembling a sale, is not a sale. The transaction is a release of the joint interest of the other members of the club. In substance the member is consuming his own property and the mode of payment is a matter of internal arrangement regulated by the rules of the club and agreed to by the member on his admission[4]. Members of a club or voluntary society are undivided joint owners, not part owners.

There are certain apparent exceptions to the general rule that a man cannot buy his own goods. Where one person has by law the right to sell another person's goods, that other person may purchase his own goods. For instance, ***if the law permits***, a man may purchase his own goods sold under an execution or distress and similarly a bankrupt may buy his own goods from his trustee. But a trustee or an auctioneer or any one having a fiduciary character, is precluded from becoming a purchaser by the general policy of the law which prohibits an agent from selling to himself[5].

1 Section 2 (10) of the Act.
2 Bell v. Lever Bros. Ltd. (1932) A. C. 161, 218 per Lord Atkin, citing Cooper v. Phibbs (1867) L. R. 2. H. L. 149.
3 Re Maclaren : ex p Cooper (1879) 11 Ch. Div. 68 C. A.
4 Graff v. Evans (1882), 8 Q. B. D. 373, 378; Davies v. Burnett (1902) 1 K. B. 666 ; Humphrey v. Tudgay (1915) 1 K. B 119 ; Metford v. Edwards (1915) 1 K B. 172 ; as to status of member of proprietary club. see Baird v. Wells (1890), 44 Ch. D. 661. See under the English law King v. England (1864) 4 B & S. 782 ; Plasycoed Collieries Co. v. Partridge Jones and Co. (1912) 2 K. B. 545 (distrainer taking goods at the appraised value), Moore v. Singer Mfy. Co. (1904) I K. K. 820, C. A (distrainer buying at auction goods distrained) ; ex parte Villars (1874) (L. R. 9 Ch. App. 432.

The second essential is that there should be a transfer of the *absolute* or general property in the thing sold ; for in law a thing may in some cases be said to have in a certain sense two owners one of whom has the general, and the other a special property in it ; and a transfer of the special property is not a sale of the thing.

Transfer of absolute or general property necessary

See also *notes on pages* 44 and 45.

To constitute a contract of sale, consideration for transfer must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale ; but if other consideration than money be given, it is not a sale. Goods may be given in consideration of work and labour done or for board and lodging[1], all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods.

Transfer must be for a price

Moreover, the money must be given as the *price*, that is to say, as a *quid pro quo* on a transfer of property on a sale. It is not every transaction involving a transfer of property and a payment that constitutes a sale : the payment may be the motive for making a gift, or for giving some benefit by agreement or otherwise[2].

Contracts of sale distinguished from other contracts.

It sometimes happens that a contract is disguised in such form that it apparently appears to be a contract of sale but when its nature is analysed it is discovered that in reality it is not a contract of sale but some other contract in disguise of a contract of sale. As the Sale of Goods Act applies only to contracts of sale and to no other contracts (S. 66, *infra*), the question whether a particular contract is a contract of sale or some other contract is a question of substance and not merely a question of form. It depends on the real meaning and nature of a contract whether it is to be construed as a contract of sale or exchange, or a mere guarantee for the price, or a bailment on trust, or a contract of *del credere* agency, or a contract of sale on commission, or a contract of loan on security or a mortgage, or a contract of hiring, or a contract to do work as agent or a license to get mineral products from land, or a pledge, or a gift, or an award or a supply of liquor for wages.

So although a contract may be clothed with the form of a contract of sale or may contain terms implying that it is a contract of sale yet if on its true construction it appears to be some other kind of contract effect will be given to it as such and the provisions of this Act will not apply.

Where the consideration for the transfer of the property in goods from one person to another consists of the delivery of other goods, the contract is not a contract of sale, but is a contract of exchange or barter[3]. But if the consideration for such a transfer consists partly of the delivery of goods and partly the payment of money, it seems that the contract is a contract of sale[4]. If the goods are to be paid for by money and other goods, on which a fixed value is put, the contract may be treated as one of sale for the aggregate

Barter distinguished from sale

1 See Keys v. Harwood (1846), 2 C B. 905 ; 15 L. J. C. P. 207.

2 See Benjamin on Sale ; 7th Edn., p. 3.

3 Harrison v. Luke (1845) 14 M. & W. 139

4 Aldridge v. Johnson (1857) 7 E & B. 885, 110 R. R. 875 ; Sheldon v. Cox (1824) 3 B. & C. 420.

sum as the price[1]. If the goods on either side are delivered any money balance payable may be recovered as on a contract of sale[2]. Similarly, if the exchange is made for goods or alternatively for price, it is sale[3].

Thus, where 32 bullocks, each valued at £6, were to be exchanged for 100 quarters of barley at £2 per quarter, the difference to be paid in cash, the contract was treated as a contract of sale[4]. But where goods were supplied on the terms that they were to be paid for by the bill of a third party, without recourse to the buyer if the bill was dishonoured, the contract was treated as exchange not sale[5].

There must be saleable property to be transferred in exchange for the price. Accordingly money cannot be the price of money. The change of a Government currency not for money is not a contract of sale, for it amounts to an exchange of money in another form. "Either form being legal tender it is impossible to say that one is the price of the other[6]". Foreign money or currency and coins of determinations or issues formerly current in the jurisdiction, but no longer so, are however, chattels which can be bought and sold. In *Moss* v. *Hancock*[7] a fivepound gold piece of the Jubilee year which was current coin, and also a curiosity and of greater value than its donomination, was stolen from the prosecutor and sold for five pounds to a dealer in curiosity. The thief was convicted, and an order for restitution was made. On a case stated, the court, drawing the inference of fact that the coin was sold as a curiosity, and was not passed as currency, held that the order was right

It also appears that where foreign money is taken in exchange for any other kind of chattel (unless it has been made legal tender and perhaps unless it is current by custom at a settled rate) the transaction is not a sale, but barter.

The legal effect of a contract of barter is practically the same as that of a contract of sale; only such transaction does not come under the Sale of Goods Act. Again, the remedies in the two cases are different in form, though not in substance.

Sale distinguished from gift

Where goods are transferred by one person to another without any price or other consideration being given in return, the transaction is called a gift. It is not sale[8].

1 Hands v. Burton (1808), 9 East 349; 12 Digest 459.

2 Sheldon v. Cox (1824), 3 B. & C. 420; Ingram v. Shirley, (1816), Stark 185; 39 Digest 601 (balance struck payable in money); Garey v. Pyke (1839) 10 Ad. and El. 512; 39 Digest 646 no balance struck). Halsbury. Laws of England 2nd Edn. Vol. XXIX, p. 6

3 South Australian Insurance Co. v. Randell (1869) L. R. 3 P. C. 101.

4 Aldridge v. Johnson (1857) 7 E. & B. 885; 26 L. J. Q. B. 296. See also Harman v. Reeve (1856), 25 L. J. C. 257.

5 Reid v. Hutchinson (1813), 3 Camp. 351.

6 Empress v. Joggessur Mochi (1878) 3 Cal. 379; Mathra Das v. Ramanand (1878) P. R. No. 73; Dasaundi v. Imam ud-Din (1905) P. R. No. 18.

7 (1899) 2 Q. B. 111; 86 L. J. Q. B. 657.

8 See Cochrane v. Moore (1890), 25 Q. B. D. 57, C. A. for distinction between sale and gift in English law.

According to English law a gift without delivery does not pass the property in the goods even though the gift is assented to by the donee, but it will be good if it is made by a deed Re Seymour (1913) 1 Ch. 475. But there may be constructive delivery-Kilpin v. Ratley (1892) 1 Q. B. 582. Under S. 123 of the Transfer of Property Act, a gift is incomplete without delivery except when it is made by a registered instrument.

Contract of sale distinguished from contract of work and labour.

There are certain contracts in which one of the parties engages himself to do some work for the other and to supply his own material for the completion of the work for a pecuniary or other consideration to be paid by the other party. The question then arises whether the finishsd article or the materials supplied by the workman should be considered as purchased by the other party. There can be no contract of sale unless the contract contemplates the delivery of a chattel as such and not merely the affixing of a chattel by the workman to land or some other chattel.[1]

A contract of sale of goods is distinguished from a contract for work and labour. The distinction is often a fine one and opinions have differed much as to the test for distinguishing between these two contracts, but since the case of *Lee* v *Griffin*[2], the general rule seems to be that if the contract is intended to result in transferring for a price from A to B an article in which B had no previous property, it is a contract of sale[3]. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, chattel as a chattel by the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel *qua* chattel the contract is one for work and labour[4]. The more recent view is that it is the substance of the contract that is to be gone into. If the substance of the contract is the production of something to be sold as a chattel, then that is a sale of goods. But if the substance of the contract is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the producer to his client some materials in addition to the skill involved, the substance of the contract is skill and it will not be a sale of goods[5]. What is the position when an artist paints a picture for a picture dealer who supplies him with canvas, paint, and brushes ?

In the words of Stephen J. "the true principle of these cases appears to be that neither the book when printed nor the deed when drawn is the absolute property of the printer or solicitor ; the author's copyright in the book and the client's interest in the deed qualify their proprietary rights. If the printer being unpaid, were to sell the copies to a publisher or if the solicitor, not getting his costs, were to threaten to destroy the deed, each could be restrained. A book is more than a bare combination of ink and paper. I should say the material used in making it had ceased to exist as such and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labour."[6]

1 See Clark v. Bulmer, 11. M. & W. 243 ; Reid v. Macbeth and Geany, (1904) A. C. 223.

2 (1861), 1 B & S. 272 ; 39 Digest 360.

3 See Chalmers, Sale of Goods Act, 1893, 11th Edn., p. 5.

4 See Halsbury; Laws of England, 2nd Ed. Vol. XXIX, p. 14.

5 Clark v. Mumford, 3 Camp 37 ; Graffin v. Armitage, (1845), 2 C. B. 336.

6 Law Quarterly Review (An article by Stephen J.)

The following illustrations will perhaps clear the point :—

(1) The contract was that the plaintiff, a printer should print for the defendant a second edition of his book, the plaintiff to find the materials, including the paper. *Held*, that this was not a contract for the sale of a thing to be delivered at a future time nor a contract for making a thing to be sold when completed but a contract to do work and labour, furnishing the materials[1].

(2) An action was brought by a dentist to recover £21 for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. Materials were wholly found by the dentist. *Held*, to be a contract for the sale of goods.[2]

Referring to *Clay* v. *Yates*[1], Crompton J. observed : "I do not agree with the proposition that wherever skill is to be exercised in carrying out the contract, that fact makes it contract for work and labour, and not for the sale of a chattel. It may be, the cause of action is for work and labour when the materials supplied are mere ancillary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, *viz.*, the teeth, are the principal subject-matter ; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

Blackburn J. said: "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action ; and that if Benvenut. Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless, for the sale of a chattel."

(3) The defendant orally commissioned the plaintiff, an artist to paint the portrait of a lady and promised to pay 250 guineas therefor. The defendant subsequently repudiated the contract before the portrait was completed. In an action by the plaintiff for the agreed price of portrait :—

Held, that it was a contract for work and labour and not for the sale of goods, as the substance of the contract was that skill and labour should be exercised upon the production of the portrait and that it was only ancillary to that contract that there would pass from the artist to his customer some materials, namely, the paint and the canvas, in addition to the skill and labour involved in the production of the portrait[3].

1 Clay v. Yates 25 L. J. Ex. 237 ; 1 H. & N. 73 ; 108 R. R, 461

2 Lee v. Griffin (1861) 1 B. & S. 272, 124 R. R. 555.

3 Robinson v. Graves (1935) K. B. 579.

Slesser L. J. observed : "If Blackburn J. meant to state that whenever there was an agreement whereby a chattel would ultimately have to be delivered there was of necessity a sale of the chattel, he is stating the matter too broadly......Normally, in the class of cases which we have here to consider, when the work has to be done in order to make the chattel fit for ultimate delivery to the purchaser, there will always be, or nearly always be, some material which at some stage or another will have to be delivered, and if that be the only test, so that the ultimate delivery of some material decided that the subject-matter is the sale of goods, I would find it difficult to understand how such cases as the delivery of written documents of parchment by a solicitor, which have always been agreed to be questions of work and not sale of goods, would not fall within the category of sale of goods. But I think that the authorities are clear to be the contrary, notwithstanding the weighty observations of Blackburn J."

(4) Where an attorney is employed to draw a deed on paper and with ink furnished by him the contract is for work and not for the sale of goods[1].

(5) A picture dealer, whose sole object was to acquire something which he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price. It was held to be a contract for the sale of goods[2].

(6) *In Dixon* v. *The London Small Arms Co.*,[3] the Secretary for war issued tenders for the supply of a number of rifles, to be made according to the plaintiff's patent, and the defendants contracted to supply them at £3 10s. each the stock in the rough and the steel tube for the barrel being supplied *out of Government stores* their value 9s. 8d. to be deducted from the price. In the manufacture the defendants applied the plaintiff's patent to the breech-action of the rifles and being sued for infringment of patent justified as being servants or agents of the Crown, the Crown having the right, it was contended, to use by its servants or agents a patented process without compensation to the patentee. It was *held by* the Court of Queen's Bench, that the contract was not for the employment of a servant or agent at a salary or wages, but simple and ordinary contract for the manufacture and supply of goods. On appeal, this decision was reversed by the Court of Appeal, who held that the patentee was not entitled to compensation, as the defendants had been directly employed by the Crown to manufacture the articles, and that the fact that they were also contractors, and were not working in the workshops of the Crown was immaterial but the decision of the Queen's Bench was unanimously restored by the House of Lords.

The question whether a certain contract of the nature described above is for sale of goods or for work and labour done which ultimately may produce a chattel which is delivered to the purchaser has vexed jurists from the earliest ages. According to the Civil Law as finally settled by Justinian, the test whether a contract was

1 Per Blackburn J. in Lee v. Griffin (1861) 1 B. & S. 272, 124 R. R. 555.
2 Isaacs v. Hardy (1884), 1 Cab. & E. 287.
3 (1876), 1 A. C. 632 ; 1 Q. B. D. 384 46 L. J. Q. B. 617 (C. A.)

locatio conductio operis or *emptio venditio* depended upon whether the material was supplied by the employer or by the workman. That view appears to have been accepted by Bayley J. in the case of *Atkinson* v. *Bell*[1] but this was repudiated in *Grafton* v. *Armitage*[2] where a person was employed not only to make but to invent the machine for a specific purpose and it was held that he could at all events recover the value of his work and materials independently of the question whether there was a contract of sale or not, and has not since been followed. The English doctrine is far more elastic in this matter than that contained in the Institutes of Justinian or in most of the foreign Civil Codes. The question of the ownership of the material on which the work is done is not conclusive of the matter, as has been noticed above.

In England under the old system of pleading a plaintiff might lose his cause if he sued *e g*, for work and labour when he should have sued for goods bargained and sold or goods sold and delivered. Again, section 17 of the Statute of Frauds now replaced in England. by section 4 of the English Sale of Goods Act, requires certain special kinds of proof to establish a right of action on the contract for the sale of goods above a certain value. Distinction between contract of sale and contract for work and labour is therefore of importance under the English Act. There is no provision in the Indian Act corresponding to section 4 of the English Act and consequently such points cannot arise in India in the same manner; still the decisions under the English Act referred to above explain clearly the principles involved.

In *Dr. Barreto* v. *T. R. Pruce*[3] Dr. Baretto, a dental surgeon, sued for the recovery of Rs. 175, the price of a set of artificial teeth made by him for the defendant, T. R. Pruce. The defendant contended that no definite price was fixed for the teeth, that after fitting on 25th they were found to be unsatisfactory and so he took them for a trial of two days at the plaintiff's request, that he found them to be so defective for various reasons specified by him, that he returned them with the letter dated 27th May, 1935 and again with a latter on the following day but that the plaintiff sent them back on both the occasions. The trial court found that the price was not fixed at Rs. 175, that the set was given on trial and that it was found not fit. The suit was therefore dismissed and it was held that the Sale of Goods Act applied and on revision the order was upheld by the High Court, following *Lee* v. *Griffin*[4].

Property in the article

Another interesting point is raised. In the cases where there is no sale of goods, is the thing produced as a whole the maker's absolute property? The answer appears to be in the negative, notwithstanding that part, or even the whole, of the materials may have been his property. In the other case, he might, however, if he found it possible and profitable, and if not restrained by patent, copyright or ane other similar law make in duplicate or in greater numbers chattels of the kind ordered, fulfil his special contract, and

8 B & C. 277, 283.
2 C. B. 336; 15 L. J. (C. P.) 20.
3 A. I. R. 1939 Nag. 19.
4 (1861) 1 B. & S. 272=121 E. R, 716.

sell the others to persons. In *Dixon* v. *London Small Arms Co.*,[1] cited above. one of the questions pointed out by Lord Penzance was : "If the defendents, while the breech-actions were being manufactured, had sold some to other persons, would that alone have given the Crown a cause of action ? The answer was in the negative."

Where an architect was employed to carry out alterations in a building and preparing plans for that purpose, it was held that the property in these plans passed on payment of the remuneration provided under the contract[2]. This shows that although a contract may be a contract to do work and not an order for a specific article, yet the property in the article produced may pass to the party giving the order.

Contract for work and materials in not a sale and has been held not to come under S. 17 of the Statute of Frauds (now S. 4 of the English Sale of Goods Act, 1893) according to which certain contracts for sale of goods should be evidenced by a memorandum in writing. From this point of view the distinction is not material in this country.

Sale distinguished from hire-purchase agreement.

Hire purchase agreements must be carefully distinguished from contracts of sale on instalment basis. In hire-purchase agreements goods are let for a certain term at a rent payable by monthly or other instalments, and the hirer has the *option* of purchasing them on payment either of the total amount of all the instalments or of that amount, together with some further sum and it is stipulated that the hirer shall remain the *bailee* and shall not become the *owner* of the goods unless and until he shall have paid the whole amount agreed upon as their price, and that the latter shall have the right to resume possession of the goods on the hirer's failure to pay any of the instalments of rent or any other breach by the hirer of the terms of the agreement.

If the hirer in effect agrees to buy the goods though the price is to be paid by instalments and not merely acquires an option to purchase them in future, then the contract is a contract of sale and not a contract of hiring. In this case the buyer is bound to pay the full price be it by instalments, and the owner is entitled to the full balance of the unpaid purchase price, if a part has been paid already. The property in the goods passes at once to the purchaser, who has, immediately on sale, a right of action for possession as against the owner, irrespective of the payment of the price or part thereof.

In *Lee* v. *Butler*[3] certain furniture was let to one Lloyd under an agreement whereby Lloyd agreed to pay "as and by way of rent" the sum of £1 on May 6, and a further sum of £96 4s. on August 1. The owner had power on default in payment, or on removal of the furniture without his consent, to take possession of the goods, in which case previous sums paid should be appropriated to rent only ; but if the hirer duly paid all the instalments and performed all other agreements, the rent should cease, and the goods should then, but not before, become the property of the hirer. Before all the instalments were paid, Lloyd's wife sold and delivered the furniture to the defendant. In an action by the owner's assignee for detention of the goods it was held that the defendant had a

1 (1876) 1 App. Cas. at p. 653.
2 Gibbon v. Pease (1905) 1 K.B. 810, C.A.
3 (1893) 2 Q. B. 318 ; 62 L. J. Q. B. 591 (C. A.)

good title as Lloyd had "agreed to buy" within the meaning of section 9 of the Factors Act.

In *Helby* v. *Matthews*[1] the circumstances were similar except that the hirer had the *option* to return the goods, while remaining liable for arrears of hire. It was held that the hirer had not "agreed to buy", and the owner could recover from the pledgee of the hirer. The effect of the contract was that the owner had made an irrevocable offer to sell, but the hirer had not *bound* himself to buy, and so there was no mutuality of sale.

Thus the distinguishing mark of a true hire-purchase agreement, as distinguished from a sale, is that the hirer should have a right to terminate the agreement at his pleasure, and that the distinguishing mark of an agreement which is a sale, and not a hire-purchase agreement, is that the hirer "should be *bound* to pay the value of the goods by way of instalments without any option to cancel the agreement, if he so wished before the full value of the goods is paid[2].

By a contract in writing between H. H. and a cycle manufacturing company, H. H. requested the company to supply him with a bicycle and undertook in consideration of his doing so to pay to the applicant corporation a deposit and the balance of the purchase price by instalments at the address of the applicant corporation. By an agreement in writing between H. H. and the applicant corporation H. H. agreed that in consideration of the bicycle being supplied to H. H. on the terms of the said order should H. H. make default in due payment of any instalment or instalments of the price of the bicycle the whole sum shall immediately become due and "I will, on demand, pay the same to you in London." The bicycle was supplied to H. H. on guarantee for the balance due. *Held*, that the proposed action was founded mainly, if not wholly, for the sale of goods for which payment was to be made by instalment[3].

It must depend on the terms of the contract whether it is to be regarded as a contract of hiring or a contract of sale, and the terms of the contract should be interpreted as a whole[4]. The differences between a true hire-purchase agreement and a contract of sale are important when the rights of third parties come to be considered. If the contract is a contract of sale, the buyer's delivery or transfer of the goods under any sale, pledge, or other disposition for value to a person taking the same in good faith, and without notice of the seller's right is as valid as if it were expressly authorised by the seller, even though the instalments had not been

1 (1895) A. C. 471 ; see also Edwards v. Vaughan (1910), 26 T. L. R. 545 (C.A.) (sale or return).

2 See also Mahabali Prasad v. H. N. Palmer=A. I. R. 1932 All, 607 ; Auto Supply Co. Ltd. v. Raghunatha Chetty =A. I. R. 1929 Mad. 884 ; Cole v. Nanalal Morarji=A. I. R. 1925 Bom. 18=(1924) 49 Bom. 172=92 I. C. 191 ; Bhimji N. Dalal v. Bombay Trust Corporation (1930) 54 Bom. 381=124 I. C. 800=A. I. R. 1930 Bom. 306 ; Percival Ltd. v. London County Council (1918) 87 L. J. K. B. 677. where there is option to purchase the buyer is under no obligation to order goods.

3 Rex v. Shoreditch County Court Registrar and another ; Ex-parte Saxon Finance Corporation, Ltd. (1938) 1 K. B. 402 ; See also Associated Distributors Ltd. v. Hall (1938) 2 K. B. 83 (C. A.)

4 See McEntire v. Crossley Brothers (1895) A. C 457, 467, and cases cited in note. See also Suraj and Sons v. J. O'Brien=A. I. R. 1931 All. 759.

paid[1]. On the other hand, if the contract was merely a contract of hiring with an option to purchase or if it be stipulated in the agreement that the hirer may at any time return the goods on payment of all the rent due up to the date of their return, he is not a person who has from the outset agreed to buy the goods and his dispositions of the goods for value are not valid as against the bailor of the goods[2], save in so far as they may be justified as an assignment of the hirer's rights under the agreement[3]. In such a case if the hirer purports to sell the goods the owner will only be able to recover from the sub-purchaser who bought from the hirer the value of his, *i.e.*, the owner's interest and cannot recover the full value of the goods.

The plaintiffs let a piano under a hire-purchase agreement whereby the hirer had the option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last of the instalment was paid, the hirer having the right at any time to terminate the agreement by returning the piano to the plaintiffs. The hirer paid several of the instalments, but before they were fully paid sold the piano to the defendant. In an action of detinue and conversion in the county court the defendant paid into court the amount of the remaining unpaid instalments. *Held*, that the defendant had acquired the rights of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, that the measure of damages was the amount of unpaid instalments, and that the plaintiffs were *not* entitled to recover the piano or its full value, but only the amount paid into court[4].

The defendants proprietors of a cinematograph theatre on 21st August 1941, agreed to buy from the plaintiff and the plaintiff agreed to sell to them, a cinematograph projector and its accessories for the sum of Rs. 4500 on the following conditions : (1) The buyers were to pay as an advance the sum of Rs. 1000/- which was to be treated as security for the due performance by them of the contract In the event of default on their part, the Rs. 1000 was to be forfeited. (2) The balance of the purchase consideration Rupees 3500, was to be paid in ten equal monthly instalments commencing on 30th September 1941. (3) If the buyers defaulted, the vendor had the option to adopt one of two courses. He could forfeit the advance, insist on the return of the machine and its accessories and charge rent therefor at the rate of Rs. 350 per month for every month the articles remained in the hands of the buyers. In the alternative, the vendor could demand immediate payment of the entire balance of the purchase consideration with interest at six per cent per annum. (4) The property in the machine was not to pass to the buyers until they had paid

1. Section 30 (2) post ; Lee v Butler, (1893) 2 Q. B. 318.
2. Helby v. Matthews, (1895) A. C. 471 ; Payne v. Wilson, (1895) 1 Q. B. 653 ; Lewis v. Thomas, (1919) 1 K. B. 319 ; Gopal Tuka Ram v. Sarabji Nusserwanji (1904) 6 Bom. L. R. 871 ; Mc Kenzie and Co. v. Muhammad Ali Khan=A. I. R. 1929 O. 155=(1929) 4 Luck. 510=115 I. C. 102; Abdul Quadir v. Watson and Sons Ltd.=A. I. R. 1930 Rang. 236 dissenting from Maung Ba Oh v. Motor House Co. Ltd.=A. I. R. 1929 Rang. 368=7 Rang. 431=120 I. C. 132.
3. Belsize Motor Supply Co. v. Cox. (1914) 1 K. B. 244 ; Whiteley v. Hilt, (1918) 2 K. B. 808.
4. Whiteley Ltd. v. Hilt, (1918) 2 K. B. 808.

the purchase price in full. The defendants having committed default in the payment of instalments the question was whether the plaintiff was entitled to forfeit the deposit and to insist on the return of the projector with hire at the rate agreed upon :

Held, that the contract was not one of hire purchase as an essential feature of a contract for hire purchase namely the option given to the prospective purchaser to terminate the contract and return the chattel was absent[1].

Under the hiring agreement, the hirer has a right to return the goods at any time, and thereby relieve himself from any further obligation as regards the future instalments a thing which he cannot do if the contract be a contract of sale[2]. In the case of a contract of sale, if possession of the goods is retaken by the seller by reason of the instalments being in arrear he cannot usually speaking, recover the arrears[3], whereas in the case of a hiring agreement he can[4].

Option to buy distinguished from a conditional agreement to buy

An option to buy must be distinguished from a conditional agreement to buy. In *Martin* v. *Whale*[5] the plaintiff agreed to buy land from P. "subject to purchaser's solicitor's approval of the title," and in consideration the plaintiff agreed to sell a motor car to P, "completion of such sale to be carried out simultaneously" with the sale of the land. Shortly afterwards the plaintiff lent the car to P. who sold it to the defendants, purchasers for value and without notice of the plaintiff's title. *Held*, that the defendants had a good title. Assuming the interdependency of the contract for the land, and that for the car, the plaintiff had agreed to buy the land, though conditionally on his solicitor's approval, and has not merely an option; accordingly the agreement for the car was also conditional, and a contract of sale could be conditional under section 1 (2) of the Act [corresponding to section 4 (2) of the Indian Sale of Goods Act, 1930], and the defendants had therefore "agreed to buy."

"On sale or return"—option to sell—no contract of sale till option exercised.

A delivery of goods to a bailee on the terms that if they are not returned within a fixed or a reasonable time, the bailor shall have the option of treating them as sold, in which case the option, if the goods are not returned, rests with the bailor only, and the property passes when he exercises it[6].

Sale distinguished from bailment.

Bailment is defined to be a delivery of goods, on a condition expressed or implied, that they shall be restored by the bailee to the bailor or according to his directions, as soon as the purpose for which they were bailed shall be answered, or kept till he reclaims them[7]. Where the terms are that the bailee shall pay

1 G. J. Subbarayalu v. A. RM. A. N. Annamalai Chettiar, A.I.R. 1944 Mad. 526.

2 Mahabali Prasad v. H. N. Palmer=A. I. R. 1932 All. 607=(1932) All 781=141 I. C. 615.

3 Hewison v. Ricketts (1894) 63 L. J. Q. B. 711 ; Attorney General v. Pritchard (1928) 27 L. J. K. B. 561.

4 Brooks v. Beirnstein (1909) 1 K.B. 98. The Auto Supply Co. Ltd. v. Raghunatha Chetty=A. I. R. 1929 Mad. 888; 52 Mad. 829=121 I. C. 593 ; Abdul Qadir v. Watson and Sons Ltd.=A. I. R. 1930 Rang. 236.

5 (1917) 2 K. B. 480 (C. A.) 86 L. J. K. B. 1305.

6 Manders v. Williams (1849), 4 Exch. 339; 39 Digest 508, 1258, 80 R. R. 588. See notes under S. 24 of the Act.

7 See Law of Bailment by Sir William Jones, p. 1; Chitty on Contracts, Chapter XIV; Benjamin on Sale, 7th Edn., p. 175.

money or deliver some *other* valuable commodity to the bailor, and not return the identical subject-matter, either in its original or altered form, this is a transfer of property for value and not a bailment[1]. The test is whether the party delivering the goods is entitled to the specific return of what he has delivered.

Where corn wos deposited by a farmer with a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim at any time an equal quantity of wheat of similar quality, or, in lieu thereof, the market price of such quantity, it was held that this was a sale and not a bailment.[2]

The purposes for which goods may be bailed are various. The principal are the following. They may be merely deposited with a friend to keep, or lent to him for use, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, with or without a power to sell them, or let out to hire. In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only ; and when any goods are *bailed*, the property still remains in the bailor[3]. The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment[4].

Sale distinguished from agency.

A contract of sale may really be a contract of agency by which the agent is authorised to sell or buy on behalf of the principal, and make over either the sale proceeds or the goods to the principal, though the agent may have a lien for his remuneration and other charges incurred by him. In such cases it is immaterial how the contract is described the real point for consideration is whether the agent is to sell or buy on his own behalf or on behalf of another person ; in the latter case it would be a contract of agency only. Each case, of course, must be decided on its own facts, though sometimes the distinction between a contract of 'sale or return' and a *del credere* agency is very fine. The true relationship of the parties has to be gathered as an iuference of fact from the nature of contract, its terms and conditions, and the terminology used by the parties is by no means decisive of the legal relationship[5].

It may be noted that as against an agent there could be no action for price or for damage for non-acceptance or non-delivery, but there could be an action for accounts for proceeds of sale

1 See South Australian Insurance Co. v. Randell (1869), L. R. 3 P. C. 101 ; Bentley Brothers v. Metcalfe and Co. (1906) 2 K. B. 548.

2 South Australian Insurance Co. v. Randell, (1869) L. R. 3 P. C. 101.

3 See Franklin v. Neate, 13 M. & W. 481; The Odessa, (1916) A. C. 145, 158, 159; Lewis v. Thomas, (1919) 1 K. B. 319.

4 See Williams on Personal Property, 18th Edn., p. 58.

5 See author's 'Law of Agency', p. 21. See also Ex.-parte White, cited above, followed in Suryaprakararaya Mudaliar v. Matheson's Coffee Works, 21 I. C. 322.

effected by him or for damage suffered by the principal for the agent not carrying out instructions. The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as an agent for the proceeds of the re-sale. The transferor is not concerned with any subsequent fluctuations in price and loss or gain to the goods. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and therefore entitled to control their sale, as for instance, to fix their price, to dictate the terms of re-sale or to re-sell the goods. He cannot demand the price of the goods before re-sale but only such proceeds as accrue to him on such re-sale. Where by the terms of the contract between the Government of Mysore and a company, the company were appointed the selling agents of oil manufactured by the Government ; bound to keep regular books of accounts of all oil received or sold, to remit the sale proceeds less commission to the Government Bankers liable for all moneys recoverable on sales effected without raising any question of bad debts and the Government had also the right to fix the maximum prices at which oil should be sold by the agents: it was held that the contract between the parties was one of agency and not of sale[1].

A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent[2]. On the other hand one who guarantees payment of the price for goods disposed of by him is an agent, for if he were a buyer he would be directly liable for the price, and a man cannot guarantee his own debt[3].

Where the real effect of a transaction is to transfer to a person all the rights of an owner of property in return for a price the transaction will be deemed to be a sale, though it may be called an agency or guarantee[4].

Where the plaintiffs were appointed "sole selling agents" for three years for all the bricks manufactured by the defendants, and the latter sought to terminate the agency at the end of two years, it was held that the relationship was one of vendor and purchaser and not that of principal and agent[5].

The main test to determine whether a person selling goods supplied by other is his agent is whether he is supposed to be selling his own goods when the time for sale comes or whether he is supposed to be selling the goods of his principal, for the

1 Sitaramchar v. Govt. of Mysore, 8 Mys. L. J. 385.

2 Nevil, In re, White, Ex parte, L. R. 6 Ch. 397 ; 40 L. J. Bankr. 73 Cf. W.T. Lamb & Sons v. Goring Brick Co. Ltd. (1932) 1 K. B. 710, C. A. See also The Kronprincessin (1917) 33 T. L.R. 292 P. C., 1918, p. 154.

3 Ex parte Bright (1879) 10 Ch. D. 566 C. A.

4 Hutton v. Lippert, (1883) 8 A. C. 309 ; Pye v. British Automobile Syndicate, (1906) 1 K. B. 425.

5 Lamb & Sons v. Goring Brick Co. (1932) 1 K. B. 710 ; See also Weiner v. Haris ; (1910) 1 K. B. 285 cited under S. 24, and Balthazar a son v. Abowath (1919) 5 Rang 1 P. C.

liability of an agent to render accounts is based on the assumption that he is dealing with money or goods entrusted to him[1]. In this case an agent of a match factory entered into a contract with a third person to promote sale of matches. The latter was required to pay for the goods before he was allowed to sell them. The profits of the sale apparently went into the pockets of the latter though the agreement was silent on this point. *Held*, that the latter was not an agent of the former but only a favoured buyer.

Indent transactions

Contracts are sometimes entered into by an indent by which one party authorises another to "place orders" on its behalf. the relation being that of principal and agent[2]. In *Holmes Wilson & Co.* v. *Bato Kristo De*[3], the expression "to purchase yourself or through your agents on my account and risk" was held to denote an agreement for agency, and wholly inconsistent with the notion that the person to whom it was addressed was invited or entitled to sell his own goods[4].

Commission agents abroad.

When a merchant in one country orders goods to be purchased for him by a commission agent in another country the relation between them is that of principal and agent though the commission agent, when despatching goods to his principal, has some of the rights of a seller e.g. a right of stoppage in transit "When the order has been accepted by the commission agent there was a contract of agency, by which he undertook to reasonable skill and diligence to procure the goods orderd at or below the limit given, to be followed up by a transfer (from the commission agent to the principal) of the property at the actual cost, with the addition of the commission; but this super-added sale is not in any way inconsistent with the contract of agency existing between the parties"[5]. In *Cassabaglon*[6] *Gibb*[6], the plaintiff merchant in London gave orders to the defendants, commission agents in *Hongkong*, to buy for him ten cases of finest "dry new crop Persian opium". Defendants could not procure the opium ordered and shipped opium of inferior quality. The plaintiff sought to make the defendants liable as vendors for the difference between the market value of the goods ordered and those actually sent; but it was held that the plaintiff could not treat the defendants as vendors, but only as agents who would be liable only for the actual loss sustained by the plaintiff through their negligence. "The contract of principal and agent is not turned into a contract of

Firm Phul Chand-Nem Chand v. Aggarwal Battery Manufacturing Co. =A. I. R. 1938 Lah. 814; see also Livingstone v. Ross, (1901) A. C. 327 (P. C.); 70 L. J. P. C. 58 and Kelly v. Enderton, (1913) A. C. 191; 82 L J. P. C. 657 (offer of an agency for sale distinguished from an offer to sell); Dixon v. London Small Arms Co., (1876) 1 App. Cas. 632 cited at p. 85 manufacture of goods for his principal by an agent contrasted with a contract for the sale of them by an independent contractor). It was held that there was no contract of agency between the Government and the supplier of arms to the Government according to certain specifications.

2 See Mahomedally v. Schiller Dosogue; 13 Bom. 470, for a full discussion of law as to indent transaction and the admissibility of custom relating thereto.

3 (1927) 54 Cal. 549.

4 See also Paul Beier v. Chotalal (1904) 30 Bom. 1 and Dayton Price & Co. v. Rohomotollah (1925) 29 C. W. N. 422.

5 Per Blackburn J. in Ireland v. Livingston (1872) L. R. 5 H. L. 395, 408.

6 (1883) 11 Q. B. D. 797.

seller and buyer for the purpose of settling the damages for the breach of duty of the agent." By S. 45 (2) of the Act seller includes a consignor or agent who has himself paid or is directly responsible for the price.

In *Mohomedally Pirkhan* v. *Schiller Dosogue & Co.*[1], the commission agents were held to constitute themselves as agents to "place orders," i.e. to effect contract of purchase on plaintiffs' account with the manufacturer and that there was no relation of buyer and seller. In *Paul Beier* v. *Chotalal*[2] it was held that according to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price nett, free godown including duty, or free Bombay Harbour, and no rate of remuneration is specially mentioned, the firm was not bound to account for the price at which the goods were sold to the firm by the manufacturer ; and it did not make any difference that the firm received a commission or trade discount from the manufacturer either with or without the knowledge of the merchant.

Award

It has been held under the English law that an *award* that one party to the arbitration shall deliver goods to the other on being paid a certain sum has not, even though the latter tenders the amount, the effect of transferring the property, unless the former assents to the transfer[3].

Contract to make and deliver set of false teeth if a contract for sale of goods.

Where a contract is for a chattel to be made and delivered it is clearly a contract for the sale of goods. A contract to make and deliver a set of false teeth is therefore contract for the sale of goods and the principles of the Sale of Goods Act apply to such a contract[4].

Contract of sale may be absolute or conditional—sub-section (2).

The word 'contract' has not been defined in this Act, but has been defined and explained in sub-section (h) of section 2 and section 10 of the Indian Contract Act, 1872. In order to determine whether a particular agreement amounts to a contract within the meaning assigned to it by that Act, the following questions are to be considered :

(1) Whether the parties to the agreement were competent to contract ?

(2) Whether the agreement was arrived at with the free consent of the parties ?

1 13 Bom. 470. See also Venkatachalam v. P. Iyengar, 47 M. L. T. 312 ; Harry Meredith v. Abdulla, (1918) 41 Mad. 1060 ; Commission agent was allowed to recover damage for breach of contract of sele and Harilal v. Pehlad Rai, (1929) 31 Bom. L. R. 508—could resell and recover damage.

2 (1904) 30 Bom. 1, 23.

3 Hunter v. Rice (1812) 15 East., 100 : 13 R. R. 394 ; see Benjamin on Sale, 7th Edn, p. 4.

4 Barotte v. Pruce, A. I. R 1939 Nag. 19.

(3) Whether it was supported by a lawful consideration ?

(4) Whether it was entered into for lawful object ?

(5) Whether the agreement is not expressly declared to be void by any provisions of the Indian Contract Act ?

If the answers to all these questions are in the affirmative taking into consideration the provisions of the Indian Contract Act, the agreement amounts to a contract. If the answer to any of them is in the negative the agreement is not a contract.

The parties are at liberty to impose any condition on the fulfilment of which the sale will be completed and the property will pass.

A contract of sale may be absolute or conditional, as the parties may please, as it is consensual. Conditions may be either contingent or promissory *i.e.*, may be either statements or promises to be made good or performed by the party by whom they are made, or collateral events or contingencies there being no promisor that the event or contingency shall happen. And conditions of either kind may be conditions precedent or conditions subsequent or in the terminology of the civil law, suspensive or resolutive : the former suspending the obligations of the promise until the condition is fulfilled and discharging him if it is not fulfilled; the latter providing for the dissolution of the contract on the happening of the specified event. There may be conditions concurrent also.

Again, such conditions may be express, and in certain cases may be implied. In *Taylor* v. *Caldwell*[1], the defendant had agreed to give the plaintiff the use of a music hall for the purpose of a concert. Before the day of a performance arrived, the music-hall was destroyed by fire, and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was held that such a contract must be regarded as 'subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor'. The principle of *Taylor* v. *Caldwell* was applied in *Howell* v. *Coupland*[2], to a case where the contract was to sell '200 tons of potatoes grown on land belonging to the defendant in Whaplode'. The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was failure of crop from disease, and the seller could deliver only 80 tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance, there being an implied condition.

Another example of an implied form providing for discharge in certain circumstances is a contract made by a common carrier. Such a contract usually means that the carrier promises to bring

1 B. & S. 826 ; 32 L. J. Q. B. 164 ; 129 R. R. 573.

2 (1876) 1 Q. B. D. 258, C. A. ; see also Sannidhi Gundayya v. Illoori Subbaya =A. I. R. 1927 Mad. 89=(1926) 51 Mad. L. J. 663=99 I. C. 459.

the goods safely to their destination or to idemnify the owner for their loss or injury, whether happening through his own default or not. But his promise is defeasible upon the occurrence of certain excepted risks, – the 'act of God' the 'king's enemies', and also injuries arising from defects inherent in the thing carried. This qualification is implied in every contract made with a common carrier and the occurrence of the risk exonerates him from liablity for loss thereby incurred[1].

In *Sannidhi Gundayya* v. *Illoori Subhaya*[2] the contract was for delivery of bags of rice by railway waggons. Both the parties knew that the Government had imposed waggon restrictions which interfered with easy transport. The defendant was unable to supply according to the contract and pleaded impossibility as a defence. The court held that he was discharged.

In the case of contingent contract the obligations of one or both of the parties depend on the occurrence or non-occurrence of a specified event, such as the safe arrival of goods, or upon the existence of a state of affairs at the time when performance is due, or upon the existence of a state of affairs not within the promisor's knowledge at the time of making of the contract, without there being any *promise* or *statement* by him that the event will happen or that the state of affairs exists or will continue. In this case if the event does not happen, or the state of affairs does not exist or continue, the non-fulfilment of such condition gives no right of action to the other party, but such party is discharged from liability[3].

Contracts for the sale of goods 'to arrive' form best illustrations of contingent contracts[4]. The gist of decisions of the English law on this point is as follows :

"1. Where goods are sold 'on arrival per ship A or *ex* ship A' or 'to arrive per ship A or *ex* ship A' the terms import a *double condition precedent*, *viz*., that the ship named shall arrive, *and* that the goods sold shall be on board on her arrival.

2. The contract may, however, show that the words 'arrival or 'to arrive' are used only in connection with *the goods*. this is only *a single condition presedent viz* , the arrival of the goods.

And *semble* that 'to be shipped,' or 'on shipment per ship A on arrival,' or 'to arrive,' import such a single condition.

3. Where the language asserts the goods to be on board of the vessel named as '1,170 bales now on passage, and expected to arrive per ship A,' or other terms of like import, or imports an engagement to ship the goods, there is a *warranty* that the goods are on board, or a promise ship them respectively, and *a single condition precedent*, to wait, the arrival of the *vessel*.

1 See Lister v. Lancashire and Yorkshire Railway Co. (1903) 1 K. B. 878.
2 A. I. R. 1927 Mad 89=99 I. C. 459.
3 Jackson v. Union Marine Insurance Co. (1874) L. R, 10 C. P. 125, at pp. 144-5.
4 See Benjamin on Sale, 7th Edn., pp. 608 to 615.

4. The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the seller, and with which he did not affect to deal: but *semble*, the condition will be fulfilled if the goods which arrive are the same as the seller intended to sell, in the unfounded expectation that they would bo consigned to him.

5. Where the sale describes the expected cargo, to be of a particular description, as "400 tons Aracan Necrensie rice, and the cargo turns ont on arrival to be rice of a different description, the precedent is not fulfilled, and neither party is bound by the bargain[1]."

As an instance of condition precedent to the passing of property may be taken the case where goods are delivered to the buyer on approval with a stipulation that the property is to pass only on payment of price. Until that is done there is no completed sale, though the buyer remains in possession of the goods.[2] When goods are not in a deliverable state or are not ascertained the property passes only when certain other conditions are fulfilled, e.g. measurement, appropriation etc.

Condition precedent must be strictly fulfilled before performance can be rquired from the other. But it may be waived. Where the condition is one inserted for the benefit of both parties, it may only be waived by mutual agreement. But the necessity for performing the condition precedent may be *waived* by the party in whose favour it is stipulated, either expressly or tacitly, by inference from his acts or conduct. This waiver is implied by law in all cases in which the party entitled to exact performance either hinders or impedes the *other party* in fulfilling the condition or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition[3].

Thus in *Mackay* v. *Dick*[4], the defender agreed to buy for £ 1,115 a steam excavator, on the condition that it should be found capable on a fair trial of excavating 350 cubic yards of clay a day on a properly opened-up "face" of a certain railway cutting which the defender was constructing, and the defender failed to provide a properly opened-up face, as it was his part to do, notwithstanding repeated requests of the sellers, in consequence of which the machine was never fairly tried, and broke down. *Held*, that the defender was bound to pay for the machine, as the sellers had implemented the condition of trial to the best of their ability, and the defender must be held to have waived the condition.

And if a party waives a condition in his favour, he must give reasonable notice if he intends to insist upon it in the future. In

1 Benjamin on Sale; 7th Edn., p. 613; see authorities cited on pages 608 to 613, on which this gist is based.

2 Re Anglo—Russian Merchant (1917) 2 K. B. 679 : condition as to obtaining license for sale. See Eisen v. M' Cabe (1920) 57 Sc. L. R. 534 H. L. sale of timber subject to license.

3 See Benjamin on Sale, 7th Edn., p. 584.

4 (1881). 6 A. C. 251, H. L. (Sc.) ; see also Colley v. Overseas Exporters (1921) 3 K. B. 302, at p. 307 observations of Mc. Cardie J.

Tyres v. *Rosedale Iron Co.*[1] the defendants were the sellers and the plaintiffs the purchasers of iron, deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly quantities at the plaintiffs' request. Afterwards, in December, 1871, *the last month* for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron. The defendants refused to deliver any more than the mouthly quantity for December. In an action by the plaintiffs for non-delivery the defendants pleaded : (1) That the plaintiffs were not ready and willing to accept the iron, and (2) that there was a mutual rescission of the contract to the extent of the iron undelivered during the months of postponement. *Held*, that the defendants were not entitled to refuse to deliver more than the monthly quantity.

Where the seller agrees to sell goods to be delivered by instalments on the condition that the buyer shall give security for the price, and delivers the first instalment before such security is given, he is not entitled to refuse delivery of the second instalment, on the ground that the condition has not been complied with by the buyer, without giving the buyer reasonable notice of his intention to insist upon the performance of the condition[2].

Thus, where the condition is divisible, to be fulfilled from time to time with reference to separate acts of performance by the other party, a waiver can be recalled, and the condition be insisted on in the future : but subject to this that, the party waiving cannot repudiate the contract without reasonable notice to the other to enable him to fulfil the condition in future.

Promissory conditions

In the second class of cases conditions may be either statements or promises to be made good or performed now or in future by the party by whom they are made. In the case of contracts containing reciprocal promises, where the due performance of his contract by one party is the entire consideration for the promise by the other party, performance of the promise first-mentioned is a condition precedent. In such cases tho promise to be performed, or statement to be made good by the party making it, is a promissory condition and its non-fulfilment not ouly relieves the other party from all his obligations under the contract. but may also give him a right of action.

A *representation* is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it. A representation, even though coutained in a written instrument, is *not an integral part of the contract*. Consequently it follows, that even if it be untrue the contract in general is not broken, nor is the untruth any cause of action unless made *fraudulently*[3] or unless it be material, in which case its untruth may justify a rescission of the contract[4]. The false representation becomes a fraud when the untrue statement was made

1 (1875), L. R. 10 Ex. 195 ; 44 L. J. Ex. 130 (Ex. Ch.).

2 Panqutsos v. Raymond Hadley Corporation of New York (1917) 2 K. B. 473 (C. A.) 385 L. J. K. P 1325

3 Dorry v. Peek (1889), 14 A. C. 337; 58 L. J. Ch, 864.

4 See Benjamin on Sale, 7th Edn. p. 580,

with a knowledge of its untruth, or without belief in its truth, or recklessly, with a carelessness where it were true or false[1]. Whenever it is determined that a statement is a substantial part of the contract, then comes the question, is it a *condition precedent* ? Or is it an *independent agreement*, breach of which will not justify a repudiation of the contract but only a cross action or counterclaim, for damages. Or in other words, we have to ascertain whether the term that has been broken is to be regarded, as a 'condition' or as a 'warranty.'

For deciding the intention of the parties the whole oontract must be looked at in the light of the surrounding circumstances.

In *Hopkins* v. *Tanqueray*[2], the plaintiff bought a horse sold at auction, without warranty. On the day before the sale, while the plaintiff was examining the horse at stables, the defendant said to him : "You have nothing to look for : I assure you he is perfectly sound in every respect." To this the plaintiff replied : "If you say so, I am satisfied," and desisted from the examination. The horse was unsound. There was no proof that the seller knew it. *Held*, that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse : that it was therefore a representation of the seller's opinion and judgment, for which he could not be made responsible, if he were honest.

In *Bannerman* v. *White*[3], the sale was of hops by Bannerman to White. There was a known objectionable practice of using sulphur in their growth. White asked if any sulphur had been used in the treatment of that year's growth, Bannerman said 'no.' White said that he would not even ask the price if any sulphur had been used. White after settling the price purchased by sample the growth of that year. The delivery corresponded with the sample, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. Bannerman sued for their price. It was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine and had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wifully false, and they further found that 'the affirmation' that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff. *Held*, that the defendants required, and that the plaintiff gave, his *undertaking* that no sulphur had been used. This undertaking was a *preliminary* stipulation ; and if it had not been given the defendants *would not have gone on with the treaty* which resulted in the sale. The plaintiff had not fulfilled the condition, and could not enforce the sale, Erle C. J, observed :

'The intention of tho parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty

1 Derry v. Peek, (1889), 14 A. C. 337.
2 (1854) 15 C. B. 130.
3 10 C. B. (N. S.) 844 ; 31 L. J. C. P. 28 ; 128 R. R. 953.

super-added ; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used : and upon this ground we agree that the rule should be discharged.'

In *Behn* v. *Burness*[1] action was brought upon a charter party dated 19th day of October 1850, in which it was agreed that Behn's ship 'now in the port of Amsterdem' should proceed to Newport and there load a cargo of coals which she should carry to Hong-Kong. At the date of the contract the ship was not in the port of Amsterdem and did not arrive there until the 23rd. When she reached Newport, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought and it was held that the words 'now in the port of Amsterdem' amounted to a condition the breach of which entitled Burness to repudiate the contract.

In determining whether a representation or statement is a condition or not, "the rule laid down by Lord Mansfield, in *Kingston* v. *Preston*[2] is "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance". The general rule is that where, from a consideration of the whole instrument it is clear that the one party relied upon his remedy and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent[3].

See section 12 and the notes thereunder, for full discussion of the subject.

The rules relating to contracts in general are laid down in sections 51 to 55 of the Indian Contract Act, and in so far as they apply to contracts of sale of goods will be noticed in the Sale of Goods Act under the appropriate sections.

Conditions precedent, concurrent and subsequent

Sections 14 to 17 of the Act lay down conditions which are implied upon the part of the seller.

In the case of a conditional promise properly so called, namely where the promisor's obligation becomes effective only if some state of fact exists or if and when some further event happens, his agreement is said to be subject to a condition precedent. When goods are sold by weight or measure, the weighing and measuring are suspensive conditions and if goods be sent on approval, the approval of the buyer constitutes a suspensive condition. Another class of promises is in which the promisor's duty is perfect to its inception, but later events, according to express or unexpressed terms of the agreement, may dispense him from performance wholly or in part. In such cases the agreement is said to be subject to a condition subsequent. Thus if goods be sold by auction with a

1 (1863) 3. B. & S. 751, 124 R. R. 794.
2 (1773), cited in Jones v. Barkley (1781), 2 Doug. 685.
3 Per Jervis, C. J. in Roberts v. Brett (1856), 18 C. B. 561; 25 L. J C. P. 280.

condition that they may be resold if not paid for within twentyfour hours, the condition is resolutive[1].

In *The Vesta*[2] there was a clause in the contract which gave the purchasers a right to reject the goods if they found them unsuited to their manufacturing business. It was held that the contract, truly construed, provided for a sale out and out to the buyers and a consequent passing of the property to them on delivery to them, with a supplementary option to the buyers in a certain event to require the sellers to buy back the goods at a price agreed.

If A and X agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on this concurrence of readiness and willingness to perform; the conditions are *concurrent*. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. The promises are interdependent and conditional upon each other, so that if A fails to deliver, X may not only sue for damages but may also refuse to pay.

As a contract of sale may be conditional, the parties may attach such consequences as they see fit to the nonfulfilment of the condition. They may stipulate that in the event of non-fulfilment both parties shall be discharged from their obligations, or that the seller shall not be bound to deliver or that the buyer shall not be bound to pay the price[3].

In some cases the parties agree that on the happening of a certain event the contract will be void and the parties will be excused from making payment or taking or giving delivery. In *New Zealand Shipping Co., v. Societe des Ateliers etc*[4]., contract with the builder of a ship became void (not voidable) in consequence of the builder becoming engaged in war. The stipulation that "the contract shall become void" was held to be a stipulation in favour of both parties or the contract was voidable at the option of either party, provided it was not brought about by any wrongful act or default of the party[5]. Where the contract provided that if the seller did not carry out the contract the only result would be that the contract would be cancelled but that he would not be liable for damages, it was held not to be competent for the seller to simply refuse to carry out the contract, but he must adduce reasons justifying the refusal[6]. The stipulation in the contract, viz. "to cancel or not to cancel the sold goods for any reason dep[illegible] solely upon you" did not destroy the mutuality necessary for the formation of a contract, and the party determining the contract must assign good reasons for doing so[7].

1 See Lamond v. Dowall (1847), 9 Q. B. 10 30; Heal v. Tattersall (1871) 7 L. R. Ex. 7.

2 (1921) 1 A. C. 774, See also Newington v. Levy (1870) L. R. 6 C. P. 180; Key v. Cotesworth (1852), 7 Ex. 595.

3 Calcutta Co. v. De Mattos (1863), 32 L. J. R. B. 322, at p. 328; See Chalmers, sale of Goods Act; 11th Edn. p. 7.

4 1919 A. C. I, 12.

5 Nusservanji v. Volkart (1888) 13 Bom. 15: contract to become null and void on the ship being lost, Hayward v. Scougate (1809) 2 Camp. 56; Covas v. Bingham (1853) 2 E. & B. 836; price payable in any event Hale v. Rawson (1858) 4 C. B. N. S. 85.

6 Chunilal v. Ahmedabad. Fine Spg. Co. (1922) 24 Bom. L. R. 295.

7 (1922) 24 Bom. L. R. 877.

Cases where general property is not transferred.

A mortgage is sometimes drafted in the form of a sale with a condition of resale to the seller on payment of the price paid originally sometimes with certain additional amount as interest and sometimes without any such additional amount, the use of the article being counted as interest[1]. Similarly, goods are some times delivered or bailed in order to secure the payment of a debt but the form given to the transaction appears in the garb of a contract of sale[2]. So also goods are sometimes hypothecated as security of a debt but the apparent form of the transaction is that of sale[3]. As section 66 (3) of the Act excludes the operation of the provisions of the Act on such transactions, it is necessary always to distinguish between a contract of sale and any of these contracts.

Mortgage of goods

Where money is lent upon the security of goods the transaction may take one of two forms. The security may be transferred in possession to the lender to hold until the money is repaid, being *pawned* or *pledged*; or the borrower may retain the possession of the security and transfer the property in it to the lender, to the intent that if the money be repaid the property shall be re-transferred, and if it be not repaid the borrower shall give up the possession, as well as the property, to the lender, the transaction being one of mortgage.

A mortgage is sometimes called a conditional sale, but, as Cave, J., has pointed out, a sale with a condition for re-sale to the original seller need have nothing to do with a mortgage[4]. Mortgage is expressly excluded from the operation of the Act by section 66 (3).

A mortgage differs from a sale in that the transfer is defeasible upon performance by the mortgagor of the condition of the mortgage. The Sale of Goods Act by S. 66 (3) excludes mortgages from the operation of the Act.

In *Backer* v. *Ahmed Esmail*[5] it was held that a purchaser of goods from the mortgagor in possession in good faith takes the same free from mortgage. The case was decided under S. 108 of the Contract Act.

The essence of a contract of sale is the transfer of general property in goods for a price[6]. The essence of a contract of mortgage is the transfer of special property in goods from mortgagor to mortgagee in order to secure a debt. Transfer of property is common in both but in sale it is the transfer of general property nothing being reserved by the transferor while in a mortgage it is the transfer of special property the transferor reserving for himself a right to take the goods back on payment of the debt to secure which the goods are transferred. Similarly, a buyer acquires full

1 Keith v. Burrows, 1 C. P. D. 722 (731); Re Hardwick Exp. Hubbard, 17 Q. B. D. 690 (698), C. A; Re Morritt, Exp. Official Receiver, 18 Q. B. D. 222 (232), C. A.

2 Story on Bailments, 557 and 286, Blundel Leigh v. Attenborough (1921) 1. K. B. 383 (389).

3 Exp. North Western Bank, L. R. 15 Eq., p. 73; Ladenburg & Co. v. Goodwin, (1912) 3 K. B. 275.

4 Beckett v. Tower Assets Co.. (1891) 1. Q. B. 1. at p 25. See also Williams v. Burgess 10 Ad. & El. 499 ; Shaw v. Jeffrey, 13 Moo. P. C. C. 432.

5 (1927) 5 Rang. 633—cases considered.

6 Halsbury Vol. XXIX (2nd Edn.).

ownership to the property sold while in the case of mortgage the mortgagee has only a limited right of using it for the time being as the owner would have done but no power of disposition unless and until the time fixed for its redemption expires or until he becomes entitled by breach of a condition by the mortgagor to sell or get it sold under the terms of the mortgage.

There are obviously two criterions to determine whether a particular transaction is a mortgage or sale. First is to see whether what is transferred is the general property—full ownership in the goods without any reservation or only a special property authorising the transferee to acquire full ownership only on failure of the transferor to fulfil certain conditions. The second criterion is to see whether the consideration for the transfer is the payment of a price or advance of a loan or more appropriately whether the purpose of the transfer is the acquisition of the full value of the subject matter or only the securing of a debt.

Pledge

A pledge is also expressly excluded from the operation of the Act by section 66 (3). A pledge differs from a mortgage—(1) because the mortgagor may retain possession, while a pledge must be delivered to the pledgee ; (2) because the mortgagee obtains the general property in the goods, while the pledgee only obtains a special property necessary to secure his rights[1].

"A pledge of personal chattels as a rule must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring. A mortgage of personal chattels involves in its essence, not delivery of possession, but a conveyance of title as a security for the debt. A mortgage of personal chattels may, however, be accompanied with the transfer of possession ; and mortgage of personal chattels in cases where possession is retained by the mortgagor may, and commonly do, provide that on default the mortgagee may take that possession which is until default, withheld from him.[2]"

In the absence of express agreement as to the sale of pawned goods, the pawnee has the power of sale where a day has been fixed for payment of the amount due and default has been made in payment at the time appointed ; where no day has been fixed for payment, the pawnee has no power to sell without proper demand and notice, but it seems that after such demand and notice he may sell[3].

In India a mortgage of goods and a pledge have the same meaning so far as their legal consequences are concerned, as mortgage has always been regarded as transferring only a special official property and not the general property or full ownership.

See also notes under section 66 (3).

Hypothecation of goods

Here the property in the goods charged for the payment of money remains with the hypothecator who also retains possession

See Chalmers, Sale of Goods Act, 11th Edn. p. 8.
Per Cotton L. J. In re Morrit (1886) 18 Q. B. D. at p. 232.
Johnson v. Stear, 15 C. B. (N. S.) 830; Pigot v. Cubley, ibid 701; The Odessa (1916) A. C. 145, 158, 159.

of them. Hypothecation of goods has been recognised in this country though there is no provision in the Contract Act to this effect[1].

Pretended sales

The description of the parties as buyer and seller in the contract does not necessarily make the contract one of sale if the intention of the seller was not to transfer the general property to the buyer[3].

In *Bowes* v. *Foster*[4] there was a pretended sale to defeat the creditors. Held, that the property in the goods did not pass to the buyer and seller was not precluded from showing that the transaction was not a real but a pretended sale.

Sale and agreement to sell distinguished—sub-section (3).

Sub-section (3) makes clear distinctions between the classes of contracts, *viz.*, actual sales and agreements for sale. An agreement to sell or an *executory* contract of sale, as is often called in English law, is a contract pure and simple and no property passes; whereas a sale, or, as it is called for distinction, an *executed* contract of sale, is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred.

The distinction is important in more ways than one. Where there is only an agreement to sell the goods which from the subject-matter of the contract remain the property of the seller till the contract is executed by passing the property at some future time or subject to the fulfilment of some condition and he can dispose of them as he likes: they may be taken in execution for his debts, and, if he becomes bankrupt, they pass to his trustee in bankruptcy. Where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages[5]. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller and may sue for damages. If there be an agreement for sale, and the goods are destroyed, the loss, as a rule, in the absence of express agreement, will be borne by the seller.

On the other hand, where there is an actual sale the property in the goods forming subject of the contract passes to the buyer under the contract, that is to say, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller. If the buyer makes default the seller may sue for the contract price. If the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of the goods themselves, such as the actions for conversion and detinue. In certain cases, too, he can follow the goods into the hands of third parties[6]. In the case of sale, if the goods are destroyed, the loss, unless otherwise agreed falls

1 See Shrish v. Mungri (1904) 9 C. W. N. 14.

2 Narasiah v. Venkataramiah (1918) 42 Mad. 59; tho bona fide purchaser is not affected by hypothecation.

3 See Weiner v. Harris (1910) 1 K. B. at p. 290.

4 (1858) 2 H. & N. 779.

5 For an exception. See section 55 (2) post (price payable on a day certain irrespective of delivery)

6 Chalmers, Sale of Goods Act, 11th Edn. p. 9., Ss. 55, 56, 57 and 58 of the Act.

upon the buyer, though the goods have never come into his possession; they are liable to satisfy his creditors. On the other hand, he is entitled to all accretions and profits incident to the goods, and has, subject to any special contract in that behalf with the seller, full power to deal with them[1].

Goods not specified

When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory contract *i. e.*, an agreement to sell. "If A buys from B ten sheep generally, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B, and to have become the property of A[2]". "Till the parties are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfil his part of the contract by furnishing any parcel of goods answering that description, the buyer could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold[3]."

Specific goods

But, on the other hand, the goods sold may be specific, that is "identified and agreed upon, at the time a contract of sale is made," and in this case it is competent for the parties to transfer the property by the contract itself. This is what is often called a "bargain and sale" or an executed contract of sale.

Test for determining whether a contract is sale or agreement to sell

Whether a contract amounts to actual sale or an agreement to sell depends on what the parties intended to make it. If that intention be clearly and unequivocally manifested, *cadit quaestio*, but as the parties frequently fail to express their intentions, or they manifest them imperfectly, certain rules have been laid down by which the intention of the parties may be ascertained, and in most instances these furnish conclusive tests. These are contained in sections 18, 20 to 22, 24 and 25 of the Act.

When there has been no manifestation of intention, the law presumes that the contract is an actual sale if the specific thing be agreed on, and it be ready for immediate delivery: but that the contract is only executory when the goods have not been ascertained[4], or if, when ascertained, something remains to be done to them by the seller, either to put them into a deliverable state[5], or to ascertain the price[6]. "In the former case, there is no reason for imputing any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the

1 See Benjamin on Sale; 7th Edn., p. 315, and the authorities cited thereunder.
2 Ibid, p. 316; See also section 18 of the Act.
3 Blackburn on Sale, 2nd Edn. p. 125.
4 Section 18 of the Act.
5 Section 21 of the Act.
6 Section 22 of the Act.

transfer of the property dependent upon the performance of those things, as a condition precedent[1]. Of course, these presumptions yield to proof of a contrary intent (reference is to specific goods), and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the seller's possession and is not ready for delivery, as an unfinished ship or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound 'or per bushel[2]".

In a recent ruling, it has been held that it is not open to a party to take up for the first time in appeal or revision, the plea that an agreement is not a sale but only an agreement to sell when there has been no suggestion of it in the trial court[3].

Agreement to sell passing into sale—sub-section (4).

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred[4].

Here again, the parties may make whatever bargain they please, and the law will give effect to it. Where the parties express their intention clearly no difficulty arises. The contract may pass the property at once, or at a future time, or contingently on the performance of some condition. But in many cases the parties either form no intention on the point, or fail to express it. To meet such cases rules have been povided in sections 20 to 25 of the Act.

The following observations of Parke J. in *Dixon* v. *Yates*[5] will be found interesting :

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery.........Where there is a sale of goods *generally* no property in them passes till delivery[6] because until then the very goods sold are *not ascertained*. But where by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very *appropriation* of the chattel is *equivalent to delivery* by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

Plea that contract was not one of sale but an agreement to sell—if open for first time in revision—contract held of sale and not of hire or agreement to sell.

1 See Sections 19 to 25 of the Act.
2 Benjamin on Sale, 7th Edn., p. 318.
3 Mohammad Ismail v Provincial Automobile Co. A. I. R. 1937 Nag. 198= 171 I. C. 781.
4 Sub-section (4) of section 4 of the Act.
5 (1833), 5 B. & Ad. 313, at 340 ; 2 L. J. K. B. 198, 39 R. R. 489.
6 Or rather appropriation.

Vendee executed an agreement described as a hire-purchase agreement in favour of vendor by which he received a car and agreed to pay Rs. 1,320 for it, Rs. 285 down and the balance by 12 monthly instalments. During the continuance of the so called hiring contract the vehicle was to remain the sole property of the owner (vendor) and on default in payment of any instalment the entire price was to become due and the owner had the power to seize the vehicle. On failure of the vendee to pay, the vendor seized the car and sold it :

Held, the vendee bound himself to pay Rupees 1,320 for the car and there was no term in the contract enabling him to return the car at any time and thereby relieve himself from any further obligation for the remaining instalments. Under the contract, he was bound to pay the whole price and so the contract was a contract of sale and not of hire and the vendor was not entitled to seize and sell the car[1].

Held also : the contract could not be called merely an agreement to sell as the vendor could not enforce an agreement to sell, if he himself had seized the car from the vendee.

It was also suggested that a plea that an agreement is not a sale but merely an agreement to sell cannot perhaps be raised for the first time in revision when there has been no suggestion of it in the trial court.

Quasi-contracts of sale.

The Act deals only with contracts of sale, properly so called. But in certain transactions, independently of the volition of the parties, the law annexes consequences similar to those which result from a contract of sale express or implied and its performance though they are not contracts of sale. Such transactions may be called *quasi*-contracts of sale. The following are chief examples of *quasi*-contracts :

Satisfied judgment in trover, trespass and detinue

In trover or trespass to goods, when the substance of the action is conversion, judgment recovered by the plaintiff for damages estimated on the footing of the full value of the goods and satisfied, either voluntarily by the defendant or by execution, operates as a sale of the goods by the plaintiff to the defendant as from the time when the judgment is satisfied[2].

In detinue, the plaintiff is entitled to a return of the goods themselves and damages for their detention[3] ; but if the goods cannot be returned, the damages should include, their value, and in that case upon judgment being satisfied, but not before, the property passes[4]. An unsatisfied judgment does not transfer the property

1 Mohammad Ismail v. Provincial Automobile Co.=A. I. R. 1937 Nag. 198=171 I. C. 781 ; Lee v. Butler, (1893) 2 Q. B. D. relied on ; Helby v. Matthews, (1896) A. C. 471 distinguished.

2 Cooper v. Shepherd (1846), 3 C. B 226 ; Brinsmead Harrison (1871) L. R. 6 C. P. 584 (trover) ; Holmes v. Wilson (1839) 10 A. & E. 503, note at p. 511, 50 R. R. 4492.

3 Eberle's Hotels Co. v. Jonas (1837), 18 Q. B. D. 459.

4 Ex. p. Drake, re Ware (1877), 5 Ch. D. 866.

in any of these cases[1]. The question whether the property does or does not pass depends upon the nature of the damages recovered. If in any case damages are assessed to include the full value of the goods, it is clear that on payment of the damages the property passes. The general rule has been stated to be that where the defendant has an interest in the goods and chattels converted then the measure of damages is the value of the plaintiff's interest as between himself and the defendant[2].

As a result of it, if the conversion complained of is a wrongful sale by the defendant to a third party, the purchaser from the defendant obtains an absolute title to the goods, when the defendant satisfies the judgment. As between himself and his seller he has a title by estoppel and the general principle of law is that when the interest accrues it feeds the estoppel, and his seller, by satisfying the judgment, having become entitled to the goods, the sub-purchaser has the advantage of that and acquires an indefeasible title against the whole world.

If the true owner sues under the Specific Relief Act, 1877, for recovery of the goods themselves, and the court, instead of ordering the return of the goods, award their value as compensation, and the compensation is paid, the property will vest in the defendant. In England, as in India, the power of the court to order the return of the goods is discretionary, and usually when the goods are articles of commerce and readily obtainable in the market, compensation in damages is regarded as an adequate remedy[3].

See also notes under section 58 of the Act.

Waiver of tort

When one person has wrongfully obtained possession of, or dealt with the goods of another, the owner of the goods may waive the tort and recover the value of the goods, as on a sale by himself to that person.[3a] Thus, where a plaintiff has been induced, by the fraud of a third person, to sell goods to an insolvent buyer, and such third person has afterwards obtained the goods himself, the plaintiff may waive the tort, and treat the transaction as a sale to such third person[4]. So also, when one person has wrongfully obtained possession of the goods of another, as when they have been sold to him by a third person who had no right to sell them, the owner of the goods may waive the tort, and treat the transaction as a sale by himself to the person who has got the goods[5]. As against the person who, having thus wrongfully sold the goods, has received the price, "the owner may waive the tort and recover the proceeds in an action for money had and received[6]." "If the servant of a company," says Lord Sumner, "acting *ultra vires* of the company converts a stranger's chattel, and, having sold it, pays the proceeds into the company's account as its servant, I suppose an

1 Ibid ; see also Bradley v. Ramsay & Co. (1912), 106 L. T. 771, C. A. ; Ellis v. John Stenning & Son (1932) 2 Ch. 81.

2 Per Channel, J. in Belsize Motor Supply Co. v. Cox (1914) 1 K. B. 244.

3 Whiteley v. Hilt (1918) 2 K. B. 808, at pp 818, 829 C. A. ; Cohen v. Roche (1927) 1 K B. 169, at pp. 179-181.

3a Rice v. Reid, (1900) 1 Q B. 54, C. A.

4 Hill v. Perrott (1810) 3 Taunt, 274.

5 See Dickinson v. Naul (1833), 4 B. & Ad. 638 ; Allen v. Hopkins (1844) 13 M. & W. 94.

6 See Arnold v. Cheque Bank (1876), 1 C. P. D. 578 at p. 585.

action for conversion would lie against the servant, and for money had and received against the company[1]."

It would seem that it is not open to the owner in all cases to elect to treat the transaction as a sale, unless the other party assent[2]. But if the defendant has sold the goods, or in any way admitted that the plaintiff is entitled to sue him in contract, the plaintiff may do so and waive the tort[3]. And if the defendant has sold the goods, the inference will be drawn that he agreed to pay the plaintiff a reasonable price for them[4].

Another illustration of the principle stated is the case where a person fraudulently induces a sale to an insolvent or infant, and then obtains possession of the goods. Such a case is explainable on the principle that the person in possession cannot by his own wrong set up a sale to the insolvent or infant, who is thus treated as the fraudulent person's agent to buy[5].

An election of this kind when once made is final. Where the owner brings an action for the price or the proceeds of the sale and recovers judgment he cannot afterwards, even though the judgment remains wholly unsatisfied, treat the transaction as tortious and sue for damages for conversion or for the recovery of the goods[6].

It is not always easy to determine whether the plaintiff's acts do or do not amount to an election. The rule has been frequently stated that if the plaintiff bring an action for money had and received, that is in point of law a conclusive election to waive the tort. This, however, is not a hard-and-fast rule ; for evidence may be given of the owner's intention not to waive the tort, as, for example, where he sues in tort, and in the *alternative* for money had and received. Where "an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act......the question whether the tort has been waived becomes rather a matter of fact than of law[7]."

Sale by estoppel

There may be a sale by estoppel too. Where the owner of the goods by his words spoken or written or by his conduct makes others believe that he has sold the goods to another and that other deals with them as his own to the prejudice of such others who happen to deal with him, the owner is estopped from denying the fact of sale or asserting to the contrary against the persons so prejudiced[8]. Suppose a defendant sells specific goods to one person, and the documents of title to the goods to another person, he

1 Att. General v. De Keyser's Hotel, 1920 A. C. 508, at p. 556 ; see Chalmers, Sale of Goods Act, 11th Edn., p. 111

2 Per cur. in Bonnett v. Francis (1801), 2 Bos. & P. 550 ; 3 R. R. 644.

3 Ibid.

4 Nicol v. Hennessey (1896), 1 Com. cas. 410 ; 12 T. L. R. 485 ; see also Benjamin on Sale, 7th Edn , p. 101.

5 Selway v. Fogg (1839). 5 M. & W. 83 ; see Halsbury, Laws of England, 2nd. Edn., Vol. XXIX, p. 22.

6 Smith v. Baker (1873) L. R. 8 C. P. 350 ; Verschures Creamaries v. Hull & Netherlands S S. Co. (1921) 2 K. B. 608. C. A.; cf. Bradley v. Ramsay & Co. (1912) 106 L. T. 771, C. A.

7 Per Bovill C. J. in Smith v. Baker supra, at pp. 355-6 ; Rice v. Reed (1900) 1 Q. B. 54 C. A. ; See Benjamin on Sale, 7th Edn., p. 101.

8 Chalmers, p. 12; Halsbury ; Vol. XXIX, (2nd Edn.) see also Ss. 5 (2) and 27 of the Act, and S. 3 of the English Act.

would be liable to both, though a doubt might arise as to which person would be entitled to the goods themselves. So, too, a person holding himself out as the buyer may be liable as such[1]. Conversely, a person who stands by and lets his goods be sold is bound by the sale[2].

The subject has been dealt with subsequently under appropriate sections of the Act.

Formalities of the Contract

Contract of sale how made

5. (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Formation of the contract of sale—old law—changes effected.

Sub-section (1) of section 5 corresponds to repealed section 78 of the Indian Contract Act, 1872, which ran as follows:—

"Sale is effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods; or with tender, part payment, earnest or part delivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery or both, shall be postponed, the property passes as soon as the proposal for sale is accepted."

This section referred to the making of a sale as well as to the passing of property. The Special Committee considered it desirable to keep the two matters separate. Further, in their opinion that section was open to the following objections:—

(1) Although by its marginal note it purported to lay down a rule relating to sales generally, it dealt only with the simplest case of a sale of ascertained goods for a fixed price.

1 Cornish v. Abington (1859), 4 H & N. 549.

2 Waller v. Drakeford (1853), 1 E. & B. 749; Cohen v. Mitchell (1890), 25 Q. B. D. 262. C. A. sale by bankrupt, trustee not intervening; see Chalmers, Sale of Goods Act, 11th Edn., p. 12.

(2) After stating that a sale could be effected by offer and acceptance of goods for a price, it went on to enumerate various circumstances which would constitute a sale. This enumeration or description was neither accurate nor complete.

(3) The acceptance referred to in the section was the acceptance of goods as distinguished from the acceptance of offer. The two were fixed in this section.

(4) The section stated that part delivery along with offer and acceptance was sufficient to constitute a sale. But, in order to effect a complete sale, part delivery must be made in course of delivery of the whole. The provisions of this section had therefore to be read subject to the provisions of section 92 of that Act [I. L. R. 15, Cal. I. at page 6][1].

The present section removes all these ambiguities.

Sub-section (2) of section 5 is new and is based on section 10 of the Indian Contract Act and section 3 of the English Sale of Goods Act, 1893[2].

The proviso to section 3 of the English Act which related to corporations has been omitted because it is already covered by the opening words of sub-section (2), namely, 'subject to the provisions of any law for the time being in force'.

Sub-section (1) of section 5 describes the mode of formation of a contract of sale which includes a sale as well as an agreement to sell while section 78 of the Indian Contract Act was confined to the formation of sale and did not describe the formation of a contract of sale or agreement to sell. While section 78 confined its formation only to ascertained goods the present section is more comprehensive and applies to all contracts of sale of goods whether ascertained or unascertained. The provision for the inference of sale from conduct of the parties in sub-section (2) is very salutary. Sub-section (1)

Formalities required for making a contract of sale.

Section 5 deals with the formalities required for making a contract of sale. The general principle underlying sections 3, 4, 7, 8 and 9 of the Indian Contract Act is that every contract is effected by an offer proceeding from one side and an

See Report of the Special Committee (Appendix C).

Section 10 of the Indian Contract Act, 1872 reads as follows :—

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses or any law relating to the registration of documents.

Section 3 of the English Sale of Goods Act, 1893, is to the following effect.

"Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations."

acceptance by the other, supported by consideration, and sub-section (1) embodies that general principle. It also emphasizes the consensual nature of a contract of sale, and consequently the parties may agree to such terms as they think fit. *Est autem emptio juris gentium, et ideo consensu peragitur.*

Sub-section (1) states that a contract of sale is made by a buyer offering to buy or a seller offering to sell goods *for a price*, and the other party accepting such offer. Every contract thus involves two parties one of whom must offer and the other must accept to buy or sell goods, and the consideration should be price [as defined in section 2 (10) of the Act].

As regards delivery of the goods or payment of the price the parties may agree among themselves. This sub-section provides that the contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalment, or that the delivery or payment or both shall be postponed. The legal consequences which follow any agreement made, for instance, for sale of goods on credit or for delivery of goods by instalments, are dealt with under the appropriate sections.

Sub-section (2)

According to sub-section (2), subject to the provisions of any law far the time being in force[1], a contract of sale may be made by—

(1) writing,

(2) word of mouth,

(3) partly by writing and partly by word of mouth,

(4) implied from the conduct of the parties.

A written offer to sell goods may be orally accepted and *vice versa*. Where a man goes into a restaurant, orders a dinner and eats it, obviously there is a sale though no mention be made of buying, or selling, or price. If, however, the contract of sale has been reduced into writing, it is, like other contracts in writing, governed by the rules of evidence laid down by sections 65-66, and sections 91-92 of the Indian Evidence Act, 1872. Oral evidence is inadmissible to contradict the terms of the written instruments[2] but such evidence is admissible to prove any fact falling within any of the provisos to section 92 of that Act. Thus, oral evidence is admissible to prove any fact which would invalidate any document, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of failure of consideration, or mistake in fact or law[3].

Where A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery,

1 See the Indian Copyright Act, 1914 (3 of 1914), section 5 of the First Schedule; the Apprentices Act, 1850 (19 of 1850), section 8: the Conveyance of land Act, 1854 (31 of 1854) sections 14 and 18; the Carriers Act, 1865 (3 of 1854), sections 6 and 7; the Merchant Shipping Act 1894 (57 and 58 Vict C. 60); section 24; the Imperial Bank of India Act, 1920 (47 of 1920), section 21; the Indian Companies Act, 1913 (7 of 1913), sections 5, 19, 35 and 88, in which any contract is required to be made in writing.

2 Section 92 of the Indian Evidence Act, 1872.

3 Section 92 of the Indian Evidence Act, 1872, proviso (1).

and B sues A for the price, A may show that the goods were supplied on credit for a term still unexpired[1]. Again where A sells B a horse and verbally warrants him sound, A gives B a paper in these words : "Bought of A a horse for Rs. 500;" B may prove the verbal warranty[2]. A agrees to buy from B a full cargo of kerosine oil which B had contracted to buy from C. Subsequently A and B request C to transfer C's contract with B into A's name. C refuses to consent to the transfer, and it is thereupon arranged between A and B that bought and sold notes should be exchanged. Seeing that the market was rising B inserts in the bought and sold notes the figures 100,000 cases as descriptive of the quantity of oil sold whereas the cargo in truth amounted to 125,000 cases. The bought and sold notes having been falsified A is entitled to disregard them and prove his contract by other and antecedent material.[3]

Writing

Section 3, clause (58) of the General Clauses Act provides that writing includes printing, lithography; photography, and other modes of representing or reproducing words in a visible from.

Contract must originate in offer and acceptance—how offer and acceptance must be made.

This Act does not prescribe how an offer to buy or sell goods can be made and in what manner such an offer can be accepted. The general priciples embodied in sections 3, 4, 7, 8 and 9 of the Indian Contract Act would therefore appear to govern these questions.

Offer

As is obvious, every contract must originate with an offer. The offer may be either by the seller to sell goods, or by the buyer to buy goods, for a price. An offer which is the same thing as a proposal, may be general or specific. An offer may also be in the form of a tender.

An offer is said to be specific when it is addressed to a definite individual or body of individuals. It is general when it is addressed to an unascertained body of individuals even though may be an ascertained individual. An example of general offer is an offer or a reward for bringing back a lost article[4].

Tenders

Where large quantities of goods are required from time to time during a particular period, it is usual to call for tenders for the supply of such goods and that tender which gives the most favourable terms is accepted. A tender thus is in the nature of a standing or continuing offer. An offer may be revoked at any time before acceptance[5], but it is made irrevocable by acceptance[6]. A company advertised for tenders for the supply of such iron articles as they might require between 1st November 1871 and 31st October 1872 Witham sent in a tender to supply the articles requird on

1 Illustration (f) to section 92, Indian Evidence Act.
2 Illustration (g) to section 92, Indian Evidence Act.
3 Durga Prosad Sureka v. Bhajan Lal Lohoa=(1904) 31 Cal. 614.
4 See Lancaster v. Walsh (1883) 150 E. R. 1324 ; 51 R. R. 441 ; See also Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q. B. 256.
5 Offord v. Davies, 12 C. B. N. S. 748, 142 E. R. 1336, 133 R. R. 491.
6 Great Northern Railway, Company v. Witham, (1873) 9 C. P. 16.

certain terms in such quantities as the Company might order from time to time, and his tender was accepted by the Company. Orders were given and executed for some time on the terms of the tender, but after a while Witham refused to execute orders. The Company sued him for non-performance of an order already given and he was held liable[1].

It is to be noted that in the case of such a tender the true position is that a person submitting a tender can withdraw it by giving a notic until it had been accepted by the Company in such a manner as to bind it. This depends upon the construction of the contract; that is, whether the tender is entire or severable. If the tender is intended by both parties to be an offer of a contract for a period involving, if accepted, an obligation on both parties during that period, the contract is entire and a tender is, after the acceptance, irrevocable. But if the tender is merely a revocable continuing offer to be accepted from time to time by the giving of orders, it is revocable by giving a notice.

The company is under no obligation to give any order, and no action would lie against it for not so doing, its so-called "acceptance" of the tender being merely a recognition of the offer. But as soon as an order is given—although not till then—there is a binding acceptance, which renders the contract complete, so far at least as concerns the instalment ordered and both parties are bound to perform it[2].

In the case cited above, Keating J. observed :

"If, before the order was given, the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here, the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise."

In *Percival Ltd.* v. *London County Council*[3] Atkin J. said :

"One knows that it is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words, the contractor offers to supply goods at a price and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound.

"There is also an intermediate contract that can be made in which although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed for them. Of course, if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer."

In *Kier & Co. Ltd.* v. *Whitehead Iron & Steel Co.*[4], the contract was for the sale of steel "as per buyer's total requirements" up to 8.000 tons. The prices having increased, the buyers ordered

1 Great Northern Railway Company v. Witham, (1873) 9 C. P. 16.
2 See Benjamin on Sale, 7th Edn., p. 83.
3 (1918) 87 L. J. K. B. 677.
4 (1938) 1 A. E R. 591.

4,000 tons for the purpose of keeping in stock and the sellers having refused, the court held that the contract was not a mere option to buyers to take any quantity up to 8,000 tons with a right to take none at all, but a contract to supply the buyers' actual needs, and consequently there was no breach by the sellers in refusing to supply goods not actually required.

Every offer must be communicated

The next step is the communication of the offer. In order to constitute a valid contract there must be mutual assent and the parties must therefore be of the same mind. Consequently, unless the acceptor knows of the offer there can be no acceptance and therefore no contract. This is true of specific as well as of general offers[1].

Where an offer consists of several terms and a document containing all of them is handed to the acceptor, his assent is presumed in all cases where the offeror has done what is reasonably sufficient to bring those terms to the knowledge of the acceptor and where he has signed the document, he is bound in the absence of misrepresentation, whether he has read the conditions or not.[2] In *L' Estrange* v. *Graucob*[3], the buyer of an automatic slot machine signed an order form containing in ordinary print the essential terms, of the contract, and certain special terms in small print. One of the terms in small print was of the effect that any express or implied condition or warranty not stated therein was excluded. In an action for damages for breach of an implied warranty of fitness, the court held that as the plaintiff has in signing the contract, not been induced by any misrepresentation, she was bound by the terms, though she might not in fact have acquainted herself with the contents.

It is to be observed that the communication of offer, acceptance or revocation of either of them is deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate or which has the effect of communicating it.[4] Performance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.[5] In order to constitute a legal offer or acceptance or revocation of either it is not enough that the party making such offer or acceptance or revoking it should only intend or make up his mind to do so, but it should be accompanied by such overt act or omission as may be sufficient to carry the information or a reasonable inference from it

[1] Cole v. Cottingham (1831) 173 E. R. 406; see also Tinn v. Hoffman & Co., (1873) 29 L. T. Exch. 271; Taylor v. v. Laird, (1856) 25 L. J. Ex. 329; Gibbons v. Proctor, (1891), 64 L. T. N. S. 594; Williams v. Carwardine (1833) 110 E. R. 500; 38 R. R. 328; Fitch v. Snedaker (1868) 38 N. Y. 248; Lalman v. Gauri Dutt (1913) 11 A. L. J. 489=19 I. C. 576. for general principles under the Contract Act.

[2] See Henderson v. Stevenson (1875) 2 H. L. (Sc.) 470; Symonds v. Pain (1861) 158 E. R. 293; Parker v. S. E. R. Co., (1877) 2 C. P. D. 416; Watkins v. Rymill (1883) 10 Q. B. D. 178; Ashby v. Talhurst (1937) 2 K. B. 242; Richardson v. Rowntree (1894) A. C. 217; Mackilligan v. Compagnie de Messageries Maritimes (1897) 6 Cal. 227.

[3] (1934) 2 K. B. 394; see also Penton v. Southern Rly (1931) 2 K. B. 103.

[4] S. 3, Indian Contract Act, 1872.

[5] Ibid, S. 8.

that the party doing the act or making the omission communicates the offer or acceptance or revocation to the other party[1].

Communication may be made in a variety of ways besides by written or spoken words or signs. For instance, it may be made by delivery of goods by that owner to a man who has offered to buy them for a certain price,[2] or by acceptance of price and crediting it in his accounts[3] or by dropping a coin into an automatic selling machine[4] or by some prearranged signs not being any form of cipher or secret writing and not having in themselves any common understood meaning[5] or by other overt act wich has the effect of communication of intention to an ordinary reasonable mind.[6] "A great number of contracts" observes stephen J., "are in the present state of society, made by the delivery by one of the contracting parties to the other, of a document in a common form stating tne terms by which the person delivering it will enter into the proposed contract *Such a form constitutes the offer of the party who tenders it.* If the form is accepted without objection by the person to whom it is tendered he is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not."[7]

Where a merchant advertises his goods to be sold at a certain price and certain conditions, such advertisement amounts to an offer and any person ordering such goods shall be deemed to accept the price and the conditions attached to it unless he takes exception to them in his order.[8] Such offers are usually known as continuous offers. Another instance of this is of Railway companies making offers in their prospectus of tariffs to carry or to take care of goods and passengers on certain terms. A traveller who takes a ticket for a journey or for luggage left at a cloak room accepts an offer in the prospectus for such purposes and is bound by the many terms which it may contain, although he has not acquainted himself with any of them and has not even seen the prospectus[9]. Such continuous offers may be made to individuals as well as the public at large[10].

But, as already observed, a mere failure to reply to a proposal or counter proposal would not *per se* amount to an acceptance of it[11]. A counter proposal, however, may be deemed to be accepted by mere silence when it contained an intimation for the other party that his silence will amount to an acceptance[12].

Acceptance of the offer

After communication of the offer comes the question of acceptance of the offer. Contract is formed by the acceptance of an offer.

1 2 App. cas. 692, Dartford Union v. Trickett, 5 T. L. R. 619 ; Fellhouse v. Bindley, 31, L. J. C. P. 204.
2 Pollock's Contract Act, p. 28.
3 Ramsgate Hotel Co. v. montefiore, L. R. I. Exch. 109.
4 Pollock's Contract Act, p. 28.
5 Ibid.
6 Paynter v. Williams, I. C & M 810.
7 Watkins v. Rymill, 1. Q. B. D. 78.
8 Ibid.
9 See Anson's Law of Contract.
10 Bengal Coal Company Ltd. v. Home Wadia & Co, 24 Bom. 87 (102).
11 Bishun Padu Holdar v. Chandi Prasad and Co., 18 A. L. J. R. 73 ; Krishnayya v. Padmanabhan (1917) M. W. N. 91.
12 Krishnayya v. Padwanabhan, (1917) M. W N. 91. See, however Bishun Padu Holdar v. Chandi Prasad & Co., 18 A. L. J. R. 73; Fellhouse v. Bindley, 32 L. J. C. P. 284.

Till then neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made.

Acceptance must also be *communicated* to the other party like offer and this means more than a tacit formation of intention. The communication of acceptance need not, however, be by words or writing. Conduct may amount to communication, and even silence where there is a duty to dissent[1], or some act must be done which the other party has expressly or impliedly offered to treat as a communication. For instance, if the offeror says "If you mean to accept my offer, inform B or hang out a flag, or fire a gun"—in all these cases if the offeree acts accordingly, the acceptance in the manner authorized turns it into a contract, irrespective of the offeror's actual knowledge of such acceptance. Similarly, a written offer to buy goods accompanied by a sum of money representing the price will be deemed to be accepted, if the other party credits the money received to his account[2].

Bowen L. J. observed in *Carlill* v. *Carbolic Smoke Ball Co.*[3] —

"One cannot doubt that, as an ordinary rule of law, "an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so; and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification."

An acceptance must be *in the terms* of the offer, otherwise it is a counter-offer, or new proposal. In *Jordon* v. *Norton*[4] the defendant offered to buy a mare, if warranted "sound and quiet in harness." The plaintiff sent the mare with a warranty that she was "sound and quiet in *double* harness." *Held*, no complete contract. In *Hutchison* v. *Bowker*[5], the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept expecting you will give us *fine barley* and *full* weight." *Held* that the plaintiff had not accepted the defendant's offer and the contract was not complete.

An inquiry of the proposer whether he will modify his terms, is not a counter proposal entitling him to treat his offer as rejected[6]. Nor can there be an acceptance of an offer made in ignorance of the offer. Therefore, where cross-offers are made simultaneously—as for instance, offers by post to sell and to buy goods at the same

1 See Dartford Union v. Trickett (1889), 59 L. T. 754 (C. A.); cf. Felthouse v. Bindley, 11 C. B. (N. S.) 869; 31 L. J. C. P. 204; 132 R. R. 784.

2 Ramsgate Hotel Co. v. Montefiore, L. R. 1, Exch. 109.

3 (1893) 1 Q. B. 256.

4 4 M. & W. 155.

5 5 M. & W. 535.

6 See Stevenson v. McLean 5 Q. B. D. 346; 49 L. J. Q. B. 701.

price—neither offer can be construed as an acceptance of the other[1]. Similarly, an acceptance cannot precede the offer[2].

The acceptance must be absolute and unconditional[3]. If the other party imposes any condition it is not acceptance but only a counter-offer which if accepted by the party making the offer may become a contract[4]. In order to convert a proposal into a promise the acceptance must be absolute and unqualified. For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties but at most expression of more or less different intentions of each party separately—in other words proposals and counterproposals[5]. The acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

Acceptance by post or telegraph.

The post office is the ordinary channel of communication, and in the vast majority of cases an authority to post an acceptance, where not express, will be implied, for it is conceived that an offer made by post or by telegraph invites an answer by post or by telegraph respectively, unless the contrary is expressed[6]. Where acceptance by post or telegraph is authorised, the posting of a letter, or despatch of a telegram, addressed to the offerer within due time accepting the offer is an acceptance. At that moment the bargain is struck, and the contract is complete, and neither party can afterwards escape from it[7]. "As soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance[8]". Accordingly an offer cannot be withdrawn after the acceptance has been duly posted, although it may not then have reached the offerer[9], or may never reach him[10]. To be effective the withdrawal must *reach* the other party before he has duly posted his acceptance. Similarly an acceptance once posted cannot be revoked, even though the letter is lost in transit and never reaches the offerer[11].

A posted letter of acceptance must be addressed to the offerer or his agent. One addressed to the acceptor's agent only will not become binding until it is actually communicated to the offerer[12]. If the letter of acceptance is misdirected by the fault of the acceptor it cannot be deemed to be a proper acceptance (*Ram Dass Chakrawarthy* v. *Official Liquidator*) (1887) 9 All. 366.

If the offerer expressly stipulates that an answer must be despatched by telegraph or by a particular post, the other party

1 See Tinn v. Hofmann (1873), 29 L. T. 271, especially at pp. 278, 279.
2 See Re Northern Electric Wire Co., exp. Hall, 63 L. T. 369.
3 See S. 7, Indian Contract Act. 1872.
4 Bhagwandas v. Shiv Dial, 22 I. C. 811; Rampur Sugar Factory v. Diwan Chand Ishar Das, 51 I. C. 860.
5 Per Bramwell L. J. in Drew v. Nunn, 4 Q. B. D. 668; I. L. R. 28 Bom. 420.
6 See Benjamin on Sale, 7th Edn., p. 85.
7 Dunlop v. Higgins (1848), 1 H. L. C. 381, 73 R. R. 98.
8 Per Thesiger L. J. in Household Fire Insurance Co. v. Grant (1879) 4 Ex. D. at 221, 48 L. J. Ex. 577.
9 Adams v. Lindsell (1888), 1 B & Ald. 681, 19 R. R. 415.
10 Household Fire Insurance Co. v. Grant (1879), 4 Ex. D. 216.
11 See Benjamin on Sale, 7th Edn. p. 89.
12 Re National Savings Bank, Hebb's case (1867) L. R. 4 Eq. 9; 36 L. J. Ch. 748.

must of course comply with that stipulation. If nothing be said about time, the offer must be accepted within a reasonable time[1] and an unusual delay may make it inoperative[2], unless the other party waives his right to treat it as such and accepts such delayed acceptance as valid.

What applies to the post applies equally to an acceptance by telegram as decided in *Stevenson* v. *McLean*[3].

When offer lapses

An offer lapses (1) by not being accepted in the mode prescribed[4], (2) by not being accepted within the time prescribed[5], (3) by rejection or counter-offer[6], (4) by the death of the offerer or the offeree before mutual assent is given, and (5) by revocation. If no time is prescribed for the acceptance, it must be accepted within a reasonable time. If the acceptor does not make a counter offer, but only desires to know if the offerer's terms are final or merely makes an enquiry, the offer does not lapse and may be accepted at any time before it is withdrawn[7].

Although the proposer may prescribe a mode of acceptance of the proposal he cannot prescribe a mode for refusal. He cannot, for instance, lay down a condition that if he receives no answer within a given time he shall consider the offer accepted.[8]

Under the English law, if a person accepts the offer in ignorance of the offerer's death there can be no contract[9], but the Indian law on the point is different. Section 6, clause (4) of the Indian Contract Act lays down that "a proposal is revoked by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance." Thus under the Indian law an acceptance in ignorance of the death or insanity of the offerer gives rise to a contract.

It has been held under the English law that the bankruptcy of the offerer does not put an end to the offer except where the offer relates to the property of the offerer which on his bankruptcy will vest in the assignee who may if he chooses make a fresh offer[10].

1 See Benjamin on Sale, 7th Edn., p. 90 and the authorities cited thereunder.

2 Bishun Padu Halder v. Chandi Prasad and Co., 18 A. L. J. R., 73.

3 (1880) 5 Q. B. D. 346; Bruner v. Moore (1904) 1 Ch. 305.

4 Section 7 (2) of the Indian Contract Act which runs as follows :—

"In order to convert a proposal into a promise, the acceptance must be expressed in some usual and reasonable manner, unless the proposer prescribes the manner in which it is to be accepted. If the proposer prescribes the manner in which it is to be accepted and the acceptance is not made in such a manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise, but if he fails to do so, he accepts the acceptance."

This is a departure from English law where acceptance not corresponding in time or place with the terms prescribed by the proposal is inoperative—See Fellhouse v. Bindley, 31 L. J. C. P. 204.

5 See Ramsgate Hotel Co. v. Montefiore (1866) 1 Ex. 109; Indian Co-operative Navigation Co. v. Padamsey (1934) 36 Bom. L. R. 32.

6 See Hyde v. Wrench (1840) 49 E. R. 132; 52 R. R. 144; but it is not rejection if it is a mere inquiry see Stevenson v. McLean (1880) 5 Q. B. D. 346 (350).

7 See Stevenson v. McLean cited above.

8 Fellhouse v. Bindley, 31 L. J. C. P. 204; Bishun Padu Holdar v. Chandi Prasad & Co., 18 A. L. J. R. 73; Mylappa v. Aga Mirza, 54 I. C. 550.

9 Reynolds v. Atherton (1922) 127 L. T. 189.

10 Meynell v. Surtees (1855) 25 L. J. Ch. 257.

Revocation of offer or acceptance

Revocation may be made at any time before the offer is turned into a contract by acceptance. A revocation has necessarily to be communicated. On this point sections 4 and 5 of the Indian Contract Act provide as follows :

"4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

5. Proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against acceptor, but not afterwards."

When communication complete

The communication of a proposal is thus complete when it comes to the knowledge of the person to whom it is made. The proposer has full power to withdraw it before that time but after the proposal is communicated to the other barty, it can be withdrawn only if the other party has not already accepted it and has not put such acceptance in the course of transmission to the proposer, in as much as communication of an acceptance is complete against the proposer when it is put in the course of transmission to him, so as to be out of the power of the acceptor[1]. The communication of an acceptance is complete against the acceptor when it comes to the knowledge of the proposer and then the agreement becomes irrevocable. Before that, however, the acceptor can withdraw his acceptance by communicating such withdrawal earlier than the communication of acceptance reaches the proposer's knowledge in as much as the communication of a revocation is complete against the person to whom it is made when it comes to his knowledge. So, if the communication of revocation of acceptance reaches the proposer after the acceptance is communicated to him the contract becoming binding the revocation becomes ineffective[2]. Where acceptance and revocation are communicnted simultaneously, for instance, where letter of acceptance and letter of revocation reach the proposer at the same time there is no contract[3].

So acceptance, after knowing that the proposal has been revoked, is void and of no effect[4]. A bid at auction is a mere offer which may be retracted before the hammer is down[5]. So where the auctioneer accepted the bids of an agent without, however, knocking down the goods to him, but the principal repudiated the bids before

1 See Henthorn v. Fraser (1892) 2 Ch. 27 (31).

2 Household Fire Insurance Co. v. Grant, 4 Ex. D., p. 222.

3 Dunmore v. Alexander, 9 Ch. (1st Ser.) 190.

4 Dickinson v. Dodd, 2 Ch. D. 463.

5 Govind v. Mana Vikraman, 14 Mad. 285.

the auctioneer notified their acceptance, it was held that there was no contract.[1]

A proposal may be revoked otherwise than by communication of notice of revocation, namely :—

(1) by the lapse of the time prescribed in such proposal for its acceptance, or if no time is prescribed, by the lapse of reasonable time without communication of the acceptance; (2) by the failure of the acceptor to fulfil a condition precedent to acceptance, and (3) by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance[2]. So, an offer made to one who is not in immediate communication with the offerer remains open and available for acceptance until the lapse of such a time as is prescribed by the offerer or is reasonable as regards the nature of the transaction[3], after which it is deemed to be withdrawn.

For detailed discussions on the subject, see commentaries on the Indian Contract Act, 1872.

Contracts implied from conduct—sub-section (2).

According to sub-section (2) of this section, subject to the provisions of any law for the time being in force, a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. According to it, if a particular law in force for the sale of a particular article provides a particular form the contract for the sale of such article must be made in that form; otherwise not withstanding anything contained in this sub-section it may be invalid. Thus share certificates of a company may be sold as goods, but the rights of the parties are subject to the provisions of the Indian Companies Act. It is not necessary that the whole of the contract may be oral or in writing. It may be partly oral or partly in writing, for instance, a written offer to sell goods may be accepted verbally or verbal offer may be accepted in writing[4]. So also goods may be ordered by a letter and may be supplied without further communication[5] or goods may be ordered by letter with subsequent verbal alteration and may be supplied accordingly[6]. "Writing" *prima facie* includes "printing, lithographs, photography and other modes of representing or reproducing words in a visible form"[7]. Any phraseology which expresses the agreement of the parties clearly and without any patent ambiguity is sufficient and it is not necessary that it should be expressed in any particular words.

"Implied" seems to be used in this section in the sense in which it is used in section 9 of the Indian Contract Act. Such implication may arise either (*a*) as an inference of fact or (*b*) as an inference of law. Terms which are implied by law in a contract of sale are dealt with in later sections. Thus, when a man takes up

1 Mackenzie Lyall & Co. v. Chamroo Singh & Co., 16 Cal. 702; see also Payne v. Cave, 3 T. R. 148; Marlow v. Harrison, 28 L. J. Q. B. 18.
2 S. 6, Indian Contract Act, 1872.
3 Adams v. Lindsell, 1 B. & Ald. 681.
4 Watkins v. Rymill, 10 Q. B. D. 178 (188).
5 Taylor v. Jones, I. C. P. D. 87.
6 Hoadly v. M'Laine, Co. Bing. 482.
7 See General Clauses Act, (Act X of 1897), S. 3 (58).

an article in a shop and pays for it, or otherwise appropriates it with the owner's consent, or when an unsigned contract is acted on by the parties according to its terms, the conduct of the parties gives rise to an inference of fact that the parties intend a sale or purchase, though they do not express their intention in words[1].

A contract of sale may also be implied from conduct of the parties as an inference of law. "In ruch a case the law does not require an actual agreement, but implies a contract from the circumstances; in fact, the law itself makes the contract[2]." A new contract of sale may be implied by law from acts done in part performance of a contract of sale, as, for example, where the buyer retains part of the goods delivered[3] or has consumed the goods before a valuation of the price[4].

Contracts under seal—contracts by corporations.

Contracts or obligations under seal, or specialities, such as deeds and bonds, are instruments which are not merely in writing, but which are *sealed* by the party bound thereby, and *delivered* by him to, or for the benefit of, the person to whom the liability is thereby incurred. In England a contract under seal is binding though it may not be supported by any consideration. Such a contract derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but from the *form* in which it is expressed. The binding effect of such a contract is the result of the doctrine of estoppel which prevents a party from denying a solemn engagement entered into by him under his hand and seal[5].

This doctrine of English law has never been accepted in British India[6]. But in the case of corporations it is invariably provided in their constitutions created by the statute that they can only contract by instrument under seal. Under the English common law rule a corporation can only bind itself by deed executed under its corporate seal so that its contracts must be made by such a deed or by its agents authorised by such a deed. To this rule, however, there are important exceptions[7]. Thus, where a corporation has taken the benefit of certain work under a contract not under seal, for the doing of which it was created, it cannot refuse to pay for such work[8]. Similarly it has been held that as a general rule, when goods have been supplied to, and used by, a corporation which can only contract under seal, the goods must be paid for[7]. In the case, however, of contracts which are required by *statute* to be under seal, the common law exceptions referred to above do not apply[9].

1 Brogden v. Metropolitan Railway Co., (1877) 2 App. Cas. 666, H. L.; See also Falcake v. Scottish Imperial Insurance Co., (1887.) 34 Ch. D. 234.

2 Per Pollock C. B. in Gore v. Gibson, 13 M. & W. 623 (626); Ramsay v. North Eastern Rly. Co., 14 C. B. N. S. 641 (where contract was inferred against express intention).

3 Hart v. Mills, 15 M. & W. 85; Mартholomew v. Marwick, 15 C. B. N. S. 711.

4 See Secs. 24, 27, 28 & 29 of the Act.

5 See Anson's Law of Contract, Part II, Chapter IV, section 2.

6 Kaliprasad v. Raja Sahib (1869) 2 B. L. R. (p. c.) 111, at p. 122.

7 See Nicholson v. Bradfield Union (1866) L. R. 1, Q. B. 620; Wells v. Mayor of Kingston-upon Hull L. R. 10 C. P. 402.

8 Lawford v. Billericay Rural District Council (1903) 1 K. B. 772 C. A.

9 See Young v. Leamington Corporation (1883) 8 App. Cas. 517; British Insulated Wire Co. v. The Prescot Urban District Council L. R. (1895) 2 Q. B. D. 453; Nixon v. Erith Urban Council (1924) 1 K. B. 87.

In *Radha Krishna Das* v. *The Municipal Board of Benares*[1] the plaintiff had supplied the defendant municipality with stone ballast for metalling its roads, but the contract did not comply with the formalities required by the Municipal Act. It was held by the Allahabad High Court that the plaintiff could not sue on the contract, either for recovery of the value of materials supplied or for damages, for non-acceptance of the delivery of the rest of the ballast. In an earlier case reported as *Abaji* v. *Trimbak Municipality*[2] it had been decided by the Bombay High Court that a Municipality could successfully sue for the balance of the amount agreed to be paid by the defendant in consideration of being granted the right to collect certain tolls, although the contract was not sealed as required by the Bombay District Municipal Act. It would appear that in deciding this case the court did not draw the distinction observed in the English decisions between the class of cases in which a seal is required by the common law and that in which it is prescribed by statute.

Where the contract is executory it cannot be enforced if it does not comply with the formalities required by law[3].

As regards the formalities required in the case of contracts with companies registered under the Indian Companies Act, see section 88 of Act VII of 1913.

Written contracts.

When all the terms of the contract are in writing no evidence of any oral agreement or statement is admissible for the purpose of contradicting, varying, adding to or subtracting from, its terms[4]. This is subject to certain exceptions[4].

Contracts partly written and partly printed.

In a contract partly written and partly printed, special importance should be given to that part of the contract which is written. It does not follow that the printed matters are to be neglected. The whole contract both written and printed must be construed and, if possible, one intelligent whole made of it[5]. The written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adopted equally to their case and that of all other contracting parties upon similar occasions and subjects[6].

In *Meghraj* v. *Baldeodas*[7] the contract consisted of a printed form written in English which provided that anything except the buyer's signature written in a vernacular language shall be null and void. The buyer inserted the specifications of the goods in Hindi which were at variance with those written in English. *Held*, the terms in English could not be modified by the Hindi terms

1 (1905) 27 All. 592, 600.
2 (1904) 28 Bom. 66.
3 Ahmedabad Municipality v. Sulemanji (1903) 27 Bom. 618.
4 Sec. 92, Indian Evidence Act. See the exceptions to that section.
5 Mohan Lal v. Krishna Premji, (1927) 30 Bom. L. R. 415; Robertson v. French (1803) 4 East, 130, 136.
6 See also Paul Beier v. Chotalal (1904) 30 Bom 1, 17.
7 (1926) 54 Cal. 97.

See *Dudgeon* v. *Pembroke*[1] as to the effect of inserting words in a contract without striking out printed words which may be applicable to a larger or different contract." But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well-known, and has been too constantly recognised in Courts of Law."[2] It is well settled that words deleted in a printed from of mercantile contract are to be treated as if they had not formed part of the printed contract ; they cannot be used to construe added words.

Contracts by 'bought and sold' notes.

A contract of sale is often brought about by a broker who issues bought and sold notes to the buyer and seller respectively. They generally begin with the words "bought for you or on your account" or "sold to you or on your account." They are identical in every respect except the names of the buyers or sellers when disclosed.

It has been held that where there was a material variation between the two notes they could not constitute a binding contract[3]. Where the notes are falsified the original contract between the parties may be proved in some other way[4]. See *Roe* v. *Naylor*[5] regarding conditions in the sale note not brought to the notice of the buyer. In *Ah Shain* v. *Moothia*[6], writing containing conditions on the sold note in Chinese not understood by or known to the other side, was held no contract.

Earnest.

Section 78 of the Indian Contract Act expressly referred to the passing of the property in the goods sold in pursuance of a contract for the sale of ascertained goods on payment of earnest. Section 4 (1) of the English Sale of Goods Act, 1893, which has superseded the 17th section of the Statute of Frauds also refers to giving something in earnest to bind the contract and preserves the distinction between part payment and earnest. Earnest is "*something*" to bind the bargain, or, "the contract" whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed.

Sir Edward Fry observed in *Home* v. *Smith*[7]:

"The practice of giving something to signify the conclusion of the contract, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence. It was familiar to the law of Rome (where the rule was that a defaulting buyer forfeited the earnest money, and a defaulting seller was bound to restore it two-fold ..That earnest and part payment are two distinct things, is apparent from the 17th section of the

1 (1877) 2 A. C. 284, 293

2 Per Lord Penzance M. A. Sassoon v International Banking Corporation. (1927) 55 Cal, 1.

3 Cowie v. Remfry (1846) 3 Moo I A 448 ; Sievewright v. Archibald (1851) 20 L. J. Q. B. 529.

4 Durga Prasad v. Bhajan Lal, (1904) 31 Cal. 614 (P. C.)

5 (1918) 3 L. J. K B 958.

6 (1899) 27 Cal. 403.

7 (1884) 27 Ch. Div. 89, 101 ; cf. Farr Smith & Co v. Messrs. Ld. (1928) 1 K. B 397, 408—409.

Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract.

The parties may intend, that the deposit may be both earnest and part payment, as is often the case in England and even in India on a sale of land. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business[1]."

Generally speaking, in a contract for sale of *immoveable* property, the deposit of earnest money is a guarantee for performance of the contract by the vendee, and when the transaction is completed, it becomes part ef the purchase money But if by default of the vendee, the transaction falls through, the money is forfeited[2]. If the sale goes off through the default of the vendor, he must return the sum so paid[3].

Section 74 of the Indian Contract Act does not apply to a deposit in the nature of earnest and a stipulation for its forfeiture in case of breach is not one by way of penalty[4].

If on the breach of the agreement by the purchaser the vendor resells the property, and sues to recover the loss arising on such resale, the deposit, altnough forfeited, is to be taken into account as diminishing the deficiency[5].

The rule is no doubt the same for goods[6]. It is, however, a question of fact, in each case, whether a particular sum paid in advance, should be treated as earnest money *i.e.*, security for due fulfilment of the contract[7]. If the seller seeks to retain money prepaid by the buyer, on the contract falling through by reason of the buyer's default, the onus is on the seller to show that it was paid as earnest money, that is, as a deposit by way of security.[8]

1 Lord Macnaghten in Soper v. Arnold (1889) 14 App. Cas. 429, 435.

2 See Dina Nath v. Malir Modi, A. I. R. 1930 Bom. 213 : Fazle Ahmed v. Rajindranath; A. I. R. 1926 Cal. 339 . Verman & Co. v Gopaldas, A. I. R. 1923 Lah. 363 ; Subbayyar v. Munisami, A. I. R. 1926 Mad. 1133 ; Nadiar Chand v. Satish Chandra, A. I. R. 1927 Cal. 964 ; Ram Chand v. Central Flour Mills, A. I. R. 1935 Lah. 192 ; Roshan Lal v. Delhi Cloth & General Mills, 33 All. 166.

3 Ibrahimbhai v. Fletcher (1896) 21 Bom. 827, 853 ; Alokeshi Dassi v. Hara Chand Dass (1897) 24 Cal. 897.

4 Natesa Aiyer v. Appavu (1913) 38 Mad. 178 ; Veerayya v. Sivayya, 26 I. C. 121 ; Dina Nath Damodhar v. Malir Mody, A. I. R. 1930 Bom. 213 ; see, however, Bhimji Dalal v. Bombay Trust Corporation A. I. R. 1930 Bom. 306=54 Bom. 381=124 I. C. 800 relating to the hire purchase contract.

5 Ockenden v. Henly (1858) E. B. & E. 485, 112 R. R. 740 ; Shuttleworth v. Clews (1910) 1 Ch. 176 ; Vellore Taluk Board v. Gopalasami (1913) 38 Mad. 801=26 I. C. 626.

6 Muhammad Habib Ullah v. Muhammad Shafi (1919) 41 All. 324=50 I. C. 948. See Pyare Lal v. Meena Mal, A. I. R. 1927 All. 621=102 I. C. 766 ; Subba Ayyar v. Munisami Ayyar, A. I. R. 1926 Mad. 1133=50 Mad. 161=98 I. C. 516 (forfeiture of deposit) ; Guwal Das Sidany v. Luchmi Chand Jhawar, A. I. R. 1930 Cal. 324=57 Cal. 106=125 I. C. 594 (forfeiture of deposit) ; Karsondas v. Chhotalal. A. I. R. 1924 Bom. 119=48 Bom. 259=77 I. C. 275 (on breach by vendor, buyer can recover the deposit).

7 Desu Rattamma v. Kakarapathi Krishnamurthi, A. I. R. 1926 Mad. 326=106 I. C. 482 ; Kanhaiya Lal v. Lakshmi Chand, A. I. R. 1923 Nag. 223=143 I. C. 192 ; Premji v. Garlic & Co., A. I. R. 1925 Sind 254=90 I. C. 573.

8 Satyanarayanamurthi v. Erikalappa, A. I. R. 1926 Mad. 410=92 I. C. 962=50 Mad. L. J. 150 ; A. I. R. 1928 Mad. 326 referred to above.

Earnest, whether given in money or not, must be something of value really given by the buyer and kept by the seller; a mere symbolic ceremony such as one party drawing a coin across the other's hand will not do.[1]

Interpretation of a contract of sale.

The Sale of Goods Act does not make any provision for the interpretation of a contract of sale and leaves it to be governed in that respect by the rules for the interpretation of contracts in general. A contract of sale reduced into writing must therefore be construed and given effect to like any other coutract.[2]

An invoice is not *per se* a written contract. It is only evidence of a contract, and may be contradicted according to the fact:[3] The ordinary rules as to the admissibily of oral evidence also apply in the same way as in the case of contracts in general.

In both written and verbal contracts any right, duty, or liability which would arise under a contract of sale by implication of law may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage be such as to bind both parties to the contract.

Contracts of sale of goods by written deeds.

When a contract of sale of goods has been embodied in a written deed the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptances are merely stages in the negotiations between the parties[4].

Subject-matter of Contract.

Existing or future goods

6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Analogous law.

Section 5 of the English Sale of Goods Act, 1893, reads as follows :—

1 See Blenkinsop v. Clayton (1817) 7 Taunt. 597, 18 R. R. 602.
2 Coddington v Paleslogo, L. R. 2 Exch 193 (200) : Houck v. Miller, 7 Q. B. D 92 (103) C A.
3 Holbling v. Elliorix, 8 H & N. 117.
4 Ralli Bros. Ltd. v. Firm Bhagwan Das, A. I. R. 1945 Lah. 35.

"(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called 'future goods.'

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

Thus section 6 of the Indian Act follows section 5 of the English Act, except that the definition of "future goods" which is contained in the latter section is omitted, being already contained in section 2.

As to sub-section (2), reference may be made to sections 31 to 36 of the Indian Contract Act which deal with contingent contracts in general. According to section 31 a 'contingent contract' is a contract to do or not to do something, if some event collateral to such contract does or does not happen. Sections 32 to 36 lay down the rules as to when a contingent contract becomes enforceable at law and when it becomes void. Sub-section (3) makes it clear that a contract for the sale of future goods operates as an agreement to sell. The rules embodied in this sub-section have been well recognised in English law (*vide* Benjamin on Sale, 7th Edn., p. 151), and were also adopted in sections 87 and 88 of the Indian Contract Act[1] which have now been repealed by this Act. Sections 87 and 88 of that Act did not, however, contain a complete statement of law on the subject. The present section has been enacted as a distinct rule specially to declare that a contract which purports to effect a present sale of future goods operates only as an agreement to sell—a declaration which was wanting in the Indian Contract Act, 1872. The question regarding the transfer of property has been dealt with separately in section 21.

It was doubted by the Roman Lawyers whether an agreement to sell "future goods" constituted a valid contract of sale: but in England this question seems to have been solved long since in the affirmative (*Chalmers*, p. 32) The purchase of a chance was, however, well known in the Civil Law and it went by the name *emptio spei*. If the intention of the parties is that the purchase-money shall be paid in any case, whether the hoped for equivalent comes to anything or not, it is commonly called for the sake of distinction, *emptio spei simplicis*. If it is that it shall not be paid unless something at any rate is forthcoming, or shall only be paid in proportion to what the purchaser actually gets, it is termed *emptio rei speratæ*.[2]

Sub-section (1)—goods which form the subject of a contract of sale may be either existing goods or future goods—"ready goods".

Sub-section (1) above lays down that the goods which form the subject of a contract of sale may be either existing goods or future goods. The expression "future goods" is defined in section 2 (6) of the Act (*see* pages 13, 33 and 34). Although "existing goods"

1 See Appendix.
2 Chalmers, p. 32, citing Moyle's Sale in the Civil Law, p. 30.

is not defined, the expression is clearly used in antithesis to the term, "future goods".

Again, 'existing goods' may be either owned or possessed by the seller. Instances of sales of goods possessed but not owned by the sellers are sales by agents and pledgees[1].

A seller might be having a stock in his actual possession at the date of the contract and parties may contract if they please for goods to be selected out of such stock, bnt any such intention must be clearly expressed. It has been held in *Mulchand Chandolia* v. *Kundanmull*[2] that (in the Calcutta market) the expression "ready goods" does not necessarily convey that the goods are in the seller's actual possession at the date of the contract. A seller who has contracted to sell "ready goods" sufficiently complies with the terms of the contract, if, at the time of entering into the contract, and during the period intervening between that date and the due date, the seller is in a position at any moment, when called upon by the buyer, to deliver goods of the contract quality and description.

Sale of future goods—wagering contracts

"Future goods" as defined in section 2 (6) of the Act means 'goods to be manufactured or produced or acquired by the seller, after the making of the contract of sale'. They are not the same as unascertained goods which form a class of existing goods. Where the bargain was that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel, the contract was held to be a contract of sale of future goods[3]. Similarly, a contract to sell oil, not yet pressed from seeds in possession, was held to be a contract of sale of future goods.[4]

In relation to contracts for the sale of goods not yet belonging to the seller, Lord Tenterden held in *Bryan* v. *Lewis*[5] that if goods be sold to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and by them, it is not a valid contract, but a mere wager on the price of the commodity. This doctrine is quite exploded now[6] and a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them provided it is not a wager.[7]

When ascertainment of price involves a wager

When the ascertainment of the price really involves a wager a contract of sale would be invalid. In *Brogden* v. *Marriott*[8] the

1 See notes on pages 90, 91, and 102 to 104
2 (1919) 47 Cal. 458—57 I. C. 140.
3 Watts v. Friend, 10 B. & C. 446; 8 L. J. (O. S.) K. B 181 : 34 R. R. 477.
4 Wilks v. Atkinson, 1815 E. R. 935.
5 (1826), Ry. & Moo. 386.
6 See Hibblewhite v. McMorine (1839), 5 M. & W. 462; 8 L. J. Ex. 271; 55 R. R. 578; Mortimer v. McCallan (1840), 6 M. & W. 58; 9 L. J. Ex. 73; 55 R. R 503; Ajello v. Worsley, (1898) 1 Ch. 274.
7 See notes on pages 64 to 67 as to when such a contract is a wagering contract and therefore invalid.
8 (1836) 3 Bing. N. C. 88, 43 R. R. 599, Gaselee J. dissenting.

defendant agreed to sell his horse to the plaintiff for £200, provided that he trotted eighteen miles in an hour; if he failed to do so the horse was to be the plaintiff's for one shilling. The animal failed in the test, and the plaintiff demanded him of the seller for a shilling. The defendant refused to deliver. It was held that the mode of ascertainment of the price was a wager within 9 Anne, C. 14, the stake being on the one side £200, and on the other one shilling.

In *Raurke* v. *Short*[1], the plaintiff and defendant, while discussing the terms of a bargain for the sale of a parcel of rags, differed as to their recollection of the price in a previous bargain and then agreed to a sale on these terms, *viz.*, that the rags should be paid for at six shillings a cwt. if the plaintiff's, but only three shillings a cwt. if the defendant's statement as to the former sale should turn out to be correct, six shillings being more and 3 shillings being less than the value of the goods per cwt. It was held that although the goods were really to be delivered and the price to be paid yet the terms of the bargain included a wager that rendered it void, and the plaintiff could not recover the price.

On the other hand in *Crofton* v. *Colgan*[2], where the plaintiff agreed to exchange a race-horse for a horse of the defendant's of less value on the terms that he should receive half the winnings of his former horse in the first two races, it was held that the contract was not a wagering one, as it was simply an agreement to give an increased price if an event occurred which would enhance the value of the animal. *Raurke* v. *Short* was distinguished as a case where the price was to vary upon an event unconnected with the value of the goods.

The three preceding cases show that a test to determine whether a transaction is a contract of sale at an uncertain price or a wager is to consider whether there is any proper relation between the event and the true value of the goods.

See also notes on pages 64 to 67 ante.

Sub-section (2)—contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen—failure of the contingency.

Sub-section (2) is merely a particular instance of the sale of future goods and categorically states that there may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen. This removes all doubts arising out of Lord Tenterden's decision in *Bryan* v. *Lewis*[3] referred to above.

As a contract of sale may be either absolute or conditional[4], a seller may contract unconditionally to sell goods to be afterwards acquired; or he may contract to sell goods "to arrive"; or, the facts

1 (1856) E. & B. 904, 103 R. R. 798, cf. Wilson v. Cole (1877), 36 L. T. 703, where the wager was treated as separable from the contract, as being concerned only with the determination of an addition to the price, for which the plaintiff did not sue.

2 (1859), 10, Ir. C. L. R. 133.

3 (1826), Ry. & Moo. 386.

4 Section 4 (2); See notes on pages 96 to 98.

of the case may show that he contracts to sell no more than a mere chance of obtaining goods, for this by English law, as by the Civil law, may be the subject of a sale[1].

The distinction between a conditional contract of sale of goods and the sale of a chance is well illustrated by the difference between the *emptio rei speratae* and the *emptio spei* of the Civil law. The former is a contract for the sale of what might be expected in the ordinary course of nature to come into existence, as a future crop, or the young of animals. An illustration of the latter oft quoted is that of the fisherman who agrees to sell a cast of his net for a given price.[2]

How the rights and obligations of the parties will be affected by the contingency happening or not happening, are questions of interpretation of the contract. The parties may make what bargain they please. They may expressly or by implication stipulate (1) that the contract shall be conditional on the part of the seller only, the price being payable in an event[3], or (2) that the contract shall be absolute on the part of the seller, despite the uncertainty of his being able to acquire the goods, and in such a case he will be liable to pay damages if he fails to perform his contract[4], or (3) that the contract shall be conditional on both sides, and, if the event does not happen, both parties shall be freed from their obligations[5], or (4) the buyer may have to pay in any event, for "a man may buy the chance of obtaining goods[6]".

As has already been noted[7], where there is a contract for the sale of goods to arrive or "on arrival" the seller does not, in the absence of terms creating such a warranty, warrant the arrival of the goods, but the contract is on both sidee contingent on their arrival, and when a particular ship is named, contingent both on the arrival of the ship in the ordinary course, and within the time stated, if any, and on the goods being on board ; where there is a warranty that the goods are in a particular ship, the contract is subject to the single contingency of the arrival ef the ship. The contingency of the arrival of the goods is not fulfilled by the arrival of similar goods consigned to third persons with which the contract did not purport to deal[8].

Sub-section (3)—present sale of future goods—agreement to sell and not sale.

1 Per Martin B., in Buddle v. Grien (1857), 27 L. J. Ex. 34 ; 114 R. R. 991.

2 See Benjamin on Sale, 7th Edn. p. 139.

3 Covas v. Bingham (1853), 2 E. & B. 836 ; 39 Digest 401.

4 Splidt v. Heath (1809), 2 Camp. 57 ; Simond v. Braddon (1857), 2 C. B. (N. S.) 324, 109 R. R. 697; Hale v. Rawson (1858) 4 C. B. (N. S.) 85, 114 R. R. 632 ; Ganesh Das-Ishar Das v. Ram Nath, A. I. R. 1929 Lah. 20—9 Lah. 148—111 I. C. 498.

5 Hayward v. Seougall (1809), 2 Camp. 56 cf. Re Tharnett & Fehr & Yullis, Ltd., (1921) 1 K. B. 219.

6 Buddle v. Green (1857) 27 L. J. Ex. 33 at p. 34, 114 R. R. 991, per Martin, B ; Hitcheock v. Giddings (1817) 4 Price 135, 18 R. R. 725, per Richard C. B. ; cf. Hanks v. Palling (1856) 6 E. & B. 659, at p. 669, 106 R. R. 752 ; Covas v. Bingham (1853) 2 E. & B. 836, 95 R. R. 812.

7 See pages 96 to 98 ; and Halsbury, Laws of England, 2nd Edn., Vol. XXIX, pp. 74 & 48 ; Benjamin on Sale, 7th Edn., pages 608 to 614.

8 Garrissen v. Perrin. 2 C. B. N. S. 681, Thornton v. Simpson, 6 touent 556.

Instead of merely agreeing to sell goods which he does not own or possess, a seller may purport to make a present *sale* of them It is of course impossible for him to effect an actual sale of such goods. "It is a common learning in the law that a man cannot grant or charge that which he hath not[1] Sub-section (3) lays down that a contract of present sale of future goods purports to operate as an agreement to sell the goods and not a sale.

This rule as to passing of property in goods not yet in existence was contained in S. 87 of the Contract Act, which was as follows .—

Where there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done after the goods are produced in pursuance of the contract, by the seller, or by the buyer with the seller's assent

ILLUSTRATIONS

(a) A contracts to sell to B for a stated price all the indigo which shall be produced at A's factory during the ensuing year A when the indigo has been manufactured gives B an acknowledgment that he holds the indigo at his disposal The ownership of the indigo vests in B from the date of the acknowledgment

(b) A for a stated price contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing Under this contract B with the assent of A takes possession of some crops grown in succession to the crops standing at the time of the contract The ownership of the crop when taken possession of vests in B

(c) A for a stated price contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing Under this contract, B applies to A for possession of some crops which were standing at the time of the contract A refuses to give possession The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession

There does not seem to be any material alteration in the law, though in S 87 the word 'acts' is used instead of appropriation and assent The illustrations referred to will therefore hold good under the present law

The property in the goods does not pass merely because the goods have been manufactured or otherwise acquired by the seller, there must be subsequent appropriation by one party and assent to it by the other to pass the property The appropriation and assent may of course be presumed from the acts and conduct of the parties. Thus, in *Langton* v *Higgins*[2] there was a sale of all the crops of peppermint oil which might be produced in 1858 *on a particular farm at a price per pound*, the buyer to advance money on account. On the same day the seller also gave to the buyer a bill of sale assigning (inter alia) all future crops of oil of peppermint until repayment of the advance It was usual for the buyer to send bottles to be filled by the seller, who weighed the oil in each bottle at the time of filling The question was what act of appropriation was necessary before the property could pass The case was decided on the ground that

1 Perkins Profitable Book, tit Grant section 65; Lunn v Thornton (1845) 1 C B. 379 386, 68 R R 727
2 (1859), 4 H & N 402 Lunn v Thornton (1845) 1 C B 379; Congreve v Evetts (1854) 10 Ex 298 buyer taking possession under a licence to seize

the parties intended that the property in the oils should pass on the filling of the bottles.

In *Mucklow* v. *Mangles*[1], a large builder contracted with P to build a barge for him and for which P advanced the whole value of the barge before it was completed. When it was nearly finished P's name was painted on the stern, but before it was completed the builder committed an act of bankruptcy. Held, property did not pass to P. In *Atkinson* v. *Bell*[2] there was refusal to accept the goods after they were manufactured. Held, the property did not pass and there could be no action for price of goods bargained and sold but an action would lie for non-acceptance. In *Hope* v. *Hayley*[3], property in the goods in stock and all substituted goods passed on taking possession of them under a license from the seller contained in the deed of transfer. In *Chidell* v. *Galsworthy*[4], under the deed of assignment the assignee was held justified in seizing after-acquired property of the assignor upon the permises built subsequently to the date of the instrument and the property passed.

Where there was assignment of all the crops and all rights etc. of the assignor's present or any after-taken farm, it was held, on a construction of the deed that the assignee was entitled to take possession of stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed but subsequently acquired and on seizure the property passed[5].

In *Grantham* v. *Hawley*[6] the plaintiff's predecessor in title, the lessor, had in demising land covenanted with the lessee, his executors and assigns, that "it should be lawful for him to take and carry away to his own use such corn as should be growing upon the ground at the end of the term". The lessee's executor's sowed corn and at the end of the term sold it to the defendant. The court decided it against the plaintiff. "He that hath it may grant all fruits that may arise upon it after, and *the property shall pass as soon as the fruits are extant.*"

Goods having a potential existence

Where a contract purported to be an immediate sale of future goods, a distinction was recognised at common law between future goods in which the seller had, and those in which he had not, what was called a potential property. Things not yet existing which may be sold (that is to say, a right to which may be immediately granted) are those which are said to have a *potential* existence, that is, things which are the natural produce, or expected increase of something already owned or possessed by the seller. Thus a person who has an interest in land may grant all the fruit which may grow upon it

1 (1808) I Taunt. 316. See Woods v. Russell (1822) 5 B & Ald. 942; Clarke v. Spence (1836), 4 Ad. & E. 448; Bellamy v. Dovey (1891) 3 Ch. 540: Where property in incomplete tanks did not pass.
2 (1828) 8 B & C. 277.
3 (1856) 5 El. & Bl. 830.
4 (1859) 6 C. B. N. S 471.

See also Hallas v. Robinson (1885) 15 Q. B. D. 288 (no seizure). Watts v. Friend (1830) 10 B. & C. 446; Sale of crops to be grown from seeds purchased, held to be sale of goods and chattels Ajello v. Worsley (1898) I Ch. 274, 280. Hibblewhite v. M'Morine (1839) 7 M & W. 200.
(1615) Hob. 132.

hereafter[1]. So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool[2]. Of such things there could be, according to the authorities an immediate grant or assignment, whereas there could only be an agreement to sell where the subject of the contract is something to be afterwards acquired, as the wool of any sheep, or the milk of any cows, which the seller might buy within the year, or any goods to which he might obtain title within the next six months[3].

The authorities treat a present grant or assignment of goods in which the grantor has a potential property as possible, and a grant of other future goods as impossible[4]. As a matter of fact in neither case, however, can there be an actual grant or assignment, but only an agreement to assign; the real distinction being that goods in which the seller has a potential property become the buyer's as soon as they are "extant"; whereas other future goods require some further act of appropriation—some *novus actus interveniens*. In neither case is there an immediate assignment or sale of the *goods*; although in the former case there may be said to be a sale of a present *right* to the goods as soon as they come into existence.

The distinction seems to be based on the ground that the goods having a potential existence are more or less specific goods; there is no difficulty as to their identification, as the things out of which they grow are clearly identified[5].

It is thus clear that the practical effect of the illustrations cited above is that the property in the future natural product of existing goods will pass to the buyer, as and when it is identified by coming into existence, without any further act of appropriation and without the necessity of invoking equity to give to the buyer rights to the goods, which it sometimes finds itself unable to do[6], and refuses to do as against a legal title acquired for value in good faith[7]. Although, therefore, the grant of the future product of existing property may, by virtue of the wording of the sub-section, be no more than an agreement to sell, it will, in the absence of any provision to the contrary in the contract, pass into a sale when the subject-matter of the contract comes into existence[8].

The assignment of a man's stock-in-trade passes the *property*, or legal ownership, in such articles only as are his at the time he executes such assignment and does not pass the property in any other articles which he may afterwards purchase[9]; not even if the

1 Grantham v. Hawley (1615) Hob. 132; Petch v. Tutin, 15 M & W. 110; Waddington v. Bristow (1801) 2 B. & P. 452.
2 Per Pollock, C, B., 15 M. & W. 116.
3 See Benjamin on Sale, 7th Edn., p. 145. The distinction has been recognised in America. Hull v. Hull, 40 Am. Rep. 165 (future offspring of seller's animals), Conderman v. Smith (cheese to be made from the milk of seller's cows.
4 Ibid. p. 148.
5 Reeves v. Barlow (1884) 12 Q. B. D. 436, 442; passing of property in building materials when brought by the buildor upon the land. See Banbury and Chaltenham Ry. v. Danial (1884) 54 L. J. Ch. 265; Passing of property in building materials when certified by an engineer.
6 In re Wait (1927), 1 Ch. 606, C A,
7 Hoare v. Dresser (1859) 7 H. L. C. 290, 115 R. R. 154.
8 See Mulla's Indian Sale of Goods Act, p. 49.
9 Tapfield v. Hillman, 6 Man. & Gr. 245; S. C. 6 Scott. N. R.

instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling house[1]. In such cases some specific act appropriating them to the grant is necessary before the property passes. And the same rule applies to assignments of all chattels personal, whether in possession or action, which a man is not entitled at the time of the assignment, but to which he shall afterwards *become* entitled[2].

It does not seem altogether clear whether, in the class of potentially existing goods, are comprised such goods as are produced by labour from potentially existing goods, such as butter or cheese to be made, from the future milk of cows, or oil to be extracted from an unsown crop. Perhaps in such cases the natural inference is that the parties do not intend the property to pass without some further act of appropriation[3].

It is to be observed that the above rule regarding goods having a potential existence though described as perfectly logical in Halsbury's Laws of England, is not approved by Chalmers who says in his Sale of Goods that there is no rational distinction between one class of future goods and another. Section 5 of the (English) Sale of Goods Act does not make any such distinction. The Indian Act defines future goods as goods to be manufactured, produced or acquired (the English Act uses the words manufactured or acquired) The use of the word "produced" in the Indian Act has evidently been made with the intention of including agricultural products, though it would seem that accretions of all kinds in the circumstances stated above would come under the definition.

If the goods are specific (*e.g.* capable of being ascertained or identified), equitable interest in them would be transferable without any act on the part of the seller when the goods are acquired or come into existence[4].

Any instrument purporting to assign chattels to be afterwards acquired can only take effect in law as a contract to transfer the legal ownership in such chattels when they shall have been acquired[5]. But in consequence of the doctrine of equity treating as actually accomplished what is agreed to be done, when any goods become subject to a contract to assign them, which is capable of being specifically enforced, the equitable interest therein passes to the intended assignee so soon as the intending assignor has acquired the legal ownership of them[6]. Lord Macnaghten observed in *Tailby v. Official Receiver*[7]: "It has long been settled that future property,

1 Lunn v. Thornton (1845) 1 C. B. 379, 68 R. R. 727 ; Joseph v. Lyons, 15 Q. B. D. 280 ; cf. Robinson v. Macdonnell (1816) 5 M. & S. 228.
2 Re Clarke, 36 Ch. D. 348, 351 (future legacy) ; Harwood v. Millar's Timber etc., Co., (1917) 1 K. B. 305, 315 (future earnings) ; Performing Right Society v. Theatre of Varieties, (1922) 2 K. B. 433, 454 (future copyrights).
3 See Benjamin on Sale, 7th Edn., p. 149.
4 Holroyd v. Marshall, 10 H. L. C. 191 ; Joseph v. Lyons, 15 Q. B. D. 280 ; Tailby v. Official Receiver, 13 App. Cas. 523.
5 Holroyd v. Marshall, 10 H. L. C. 191 ; Collyer v. Isaacs, 19 Ch. D. 342 ; Joseph v. Lyons, 15 Q. B. D. 280.
6 Langton v. Horton, 1 Hare, 549 ; Holroyd v. Marshall, 10 H. L. C. 191 ; Brown v. Bateman, L. R. 2 C. P. 272.
7 (1883) 13 App. Cas. 523, at pp. 543, 547, see also Brandt's Sons & Co., v. Dunlop Rubber Co., (1905) A. C. 454 ; See also In re Wait (1927) 1 Ch. 606, C. A., where previous decisions on equitable assignments were considered.

possibilities and expectations are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effetuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence if it is of such a nature and so described as to be capable of being ascertained and identified... .The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case."

"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment[1].

In *Industrial Finance Syn. etc.* V. *Lind*[2], there was assignment of an expectant share of personal estate which became vested before bankruptcy of the assignor. It was held that this did not impose merely a personal liability which could be affected by a bankruptcy.

A person purporting to sell as owner is estopped from denying that he was the owner when he subsequently acquired the goods.[3]

The general equitable principle has been applied in India also. Where A at Virangam consigned goods to B at Bombay for sale on commission, and drew hundies against the goods which B accepted and paid, and it was arranged that B should pay himself the advances out of the sale proceeds of the goods when he received and sold them, it was held that the agreement constituted a good equitable charge upon the goods, and that they could not therefore be attached by persons holding decrees against A, even though the goods had not yet come into the possession of B[4]. *Maradugula* v. *Katala*[5] similarly relates to a case where money was advanced by A to B to cut and prepare timber in a forest, and A was to pay himself the advances out of the sale proceeds of the goods when he received and sold them.

It must be clearly noted that the cases relating to general principles of equitable assignments under the English law must be applied with caution to facts of a case in India, for it is possible the

1 Collyer v. Isaacs (1881), 19 Ch. D. 342; see at pp. 351, 354, C. A.

2 (1915) I Ch. 744.

3 Edmunds v Best (1862) 7 L T. 279.

4 Velji Hirji & Co. v. Bharmal (1896) 21 Bom. 287; Palaniappa v. Lakshmanan (1893) 16 Mad. 429; Baldeo Parshad v. Miller (1904) 31 Cal. 667 (mortgage of indigo cakes to be manufactured hereafter). Navajee v. The A. G. (1918) 38 Mad. 500; The words were "on should have a charge over chepues or moneys received for worse done with your capital; held, it created a charge Bansidhar v. Sant Lal (1887), 10 All. 133: hypothecation of certain future indigo produce became complete when the crop came into existence and was enforceable against a transfree with notice.

5 9 I. C. 255=(1911) 21 Mad. L. J. 413.

decision in the English case under reference might have been influenced by the existence of imperative statutory rules as to particular kinds of transactions or dealings with particular kinds of property, as the Bills of Sale Acts. Facts of each case must be examined carefully in the light of the general principles explained above and statutory rules, if any, relating to the particular property before decision is arrived at.

Estoppel

Though the goods may not be ascertained the seller may be estopped from alleging that the goods are unascertained. In *Knights* v. *Wiffen*[1], the defendants sold eighty quarters of barley to M out of a larger quantity lying in sacks in his granary adjoining a railway station. No particular sacks were appropriated to M. M sold sixty quarters of it to the plaintiff, who paid him for them and received from him a delivery order addressed to the station master asking him to confirm the transfer. On the station master showing the delivery order to the defendant he said:" All right, I will put the barley on the line". M bacame bankrupt, and the defendant as unpaid vendor refused to deliver the barley. Held, that the defendant was estopped from denying that the property in the sixty quarters of barley has passed to the plaintiff, as by making the statement he induced the plaintiff to rest satisfied under the belief that property has passed and so to alter his position by abstaining from demanding back the money which he had paid to M.

In *Harman* v. *Anderson*[2], the owner of cartain casks of butter lying in the defendant's warehouse sold them to one D and gave him a delivery order, which was lodged with the defendants, who transferred the goods into his name in their books and debited him with rent. D became bankrupt and his assignee brought an action in trover. Held, the defendants were estopped from disputing an attornment to the purchaser and the right to stop the goods in transit was gone.

In *Ganges Manufacturing Co.* v. *Sourujmall*[3] there was a contract to by for cash on delivery but the seller handed delivery orders to buyer without payment. The buyer then endorsed the same to a third party who advanced money on the delivery orders and obtained part delivery of the goods. The seller assented to the delivery being made to the third party by writing on the delivery orders. Held, though there was no appropriation by the seller and no payment by the bayer, the seller was estopped from denying that he held the goods covered by the delivery orders at the disposal of such third party and was bound to deliver the same.

But the mere giving of the delivery order by the sellers, and receipt of the same by the warehouse men without objection does not estop them from denying the buyer's title.[4]

1 (1870) L. R. 5 Q. B. 660 ; See also Dixon v. Kennaway, (1900) 1 Ch 833.
2 (1809) 2 Camp. 243.
3 (1880) 5 Cal. 669.
4 Laurie v. Dudin & Sons (1926) 1 K. B. 223.

In *Woodley* v. *Coventry*[1], the plaintiff expressly inquired if the delivery order was correct and was expressly told "yes" by the defendant, who accepted it, and thereupon the plaintiff paid part of the price. Held, the defendant was estopped from denying that he was holding the goods on plaintiff's behalf[2].

Goods perishing before making of contract

7. Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Specific goods—Goods perishing before making of contract.

Pothier[3] says : "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, and I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist the site and what is left of the house are not the subject of our bargain, but only the remainder of it."

Section 7, therefore, declares that 'where there is a contract for the sale of *specific* goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract'.

Analogous English law

The corresponding section 6 of the English Sale of Goods Act, 1893, runs as follows :

"Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void "

Perished goods

"Perish" is not defined in the English Act although it has been taken to mean not only goods physically destroyed, but also if they had ceased to exist in a commercial sense, that is, if their merchantable character, as such, had been lost, as dates contaminated with sewage, and therefore unsaleable as dates ; or table potatoes which had sprouted ; or cement which had lost, through moisture, its properties as such[4]. The present section specifically relates to goods both which have perished or have become so damaged as no longer to answer to their description in the contract, at the time when the contract was made. The Special Committee observed on this point :

"Some writers observe, that goods must be deemed to have 'perished' not only if they are physically destroyed, but also if they have ceased to exist in a commercial

(1863) 2 H. & C. 164 ; See also Anglo India Jute Mills Co. v. Omademull (1910) 38 Cal. 127 ; Goodwin v. Roberts (1876) L. R. I. A. C. 476.
Stonard v. Dunkin (1910) 2 Camp. 344.
Contract de Vante, No. 4.
See Asfar v. Blundell, (1896) 1 Q. B. 123 ; Rendell v. Turnbull & Co. (1908), 27 N. Z. L. R. 1067 ; Duthie v. Hilton (1868), L. R. 4 C. P. 138 ; Montreal Light, etc. Co. v. Sedgwick, (1910) A. C. 598 (P. C.). Benjamin on Sale, 7th Edn., p. 158.

sense, that is, if their merchantable character, as such has been lost.. ......There seems to be a strong opinion in favour of the view that the import of the word is not to be restricted to mere physical destruction We have accordingly made it clear that the goods must have been either physically destroyed or so damaged as not to answer the description given in the contract"

This section is confined to the case of "specific goods" as defined in section 2 (14) of the Act. Generic goods, that is to say, goods defined by description only, come within the maxim *genus nun-quam perit*[1]. The rule which it embodies may be regarded as a partfcular instance of the effect of mutual mistake making an agreement void[2], or of impossibility of performance[3]. This section applies whether the contract purports to be an agreement to sell or a sale, whereas section 8 applies only to agreements to sell[4].

Scope of section 7

From the decisions under the English law it may be said that the section will apply not only to cases where the goods have been destroyed or have been so damaged as no longer to answer to their description, but also to cases where the seller is irretrievably deprived of them as when they have been stolen or lawfully requisitioned by the Government or have, in some other way, been lost and cannot be traced.[5]

Illustrations

The following illustrations will explain the meaning of this section :—

(1) A cargo of corn, loaded on a vessel not yet arrived, was sold on May 15. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 24th of the preceding month of April. *Held*, that the sale of May 15 was properly repudiated by the purchaser[6]

(2) In *Smith* v. *Myers*[7] the contract was for the sale of "about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s* 9*d*. per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract, to be void. Before the date of the contract, but without the seller's knowledge, an earthquake had destroyed the greater part of the nitrate. The sale was held void.

(3) Sale of 700 bags of nuts, identified by marks, lying in a named warehouse. Unknown to the seller, before the sale, 109 of the bags had been stolen The sale is void and the buyer cannot be compelled to take the remainder.[8]

Knowledge of destruction

The section assumes that the seller does not know that the goods have perished. If the seller knows that the goods have

1 Re Thornett & Fehr & Yuills, (1921) 1 K. B. 219; Hayward Brothers v Daniel (1904), 91 L. T. 319.

2 See section 20, illustrations (a) and (b), Indian Contract Act.

3 Section 56 of the Indian Contract Act.

4 See Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 48

5 Barrow Lane & Ballard v. Phillips & Co Ltd., (1929) 1 K B. 574; Shipton Anderson & Co. v Harrison (1915) 3 K. B. 676, 682.

Hastie v Couturier 9 Ex. 102; 96 R. R. 598; Couturier v. Hastie (1856) 5 H. L. C 673, 101 R. R. 329.

L R. 5 Q B. 429; L. R 7 Q. B. 139, Ex. Ch.

Barrow Lane & Ballard Ltd. v Phillips & Co Ltd., (1929) 1 K. B, 574.

perished, then, by implication from the terms of this section, and according to general principles[1], the seller, but not the buyer, will be estopped from asserting that no contract exists. Conversely, if the buyer only knows of the loss of the goods, he, but not the seller, will be estopped from setting up a contract[2].

If the seller, knowing the goods to have perished, agreed to sell them, he would be liable in damages if the buyer did not know of this fact, as in other cases where a person promises for valuable consideration to do something which he knows he cannot perform[3]. It has been held under the English law that as the contract is void *ab initio*, the price, if paid, can be recovered back. It is money paid under a mistake of fact, for the contract is founded on mutual mistake[4].

Non-existence of part of the goods sold.

Where two or more things are sold for an entire price, or otherwise under an entire contract, and one or more of them have perished at the date of the contract, is the contract void as to the remainder? In *Barrow* v. *Phillips*[5] the sale was of 700 bags of nuts and only 591 bags were in existence at the date of the contract, the remaining having been stolen. It was held that the contract was void and the buyer could not be compelled to take the remainder. The seller could not be compelled to deliver what was left, and equally the buyer if he had actually paid the whole or part of the purchase price could recover it, as on a total failure of consideration: unless indeed he had actually received and used part of the goods, in which case he would obviously have to pay at the contract rate, as in the case cited. Wright J. observed:

'This case raises a further problem which, so far as I know, and so far as the learned counsel has been able to ascertain has never hitherto come before the court. The problem is this: Where there is a contract for the sale of specific goods, such as the parcel of goods in this case, and some, but not all of the goods have then ceased to exist for all purposes relevant to the contract because they have been stolen and taken away and cannot be followed or discovered anywhere, what then is the position? Does the case come within section 6 of the Sale of Goods Act (corresponding to section 7 of the Indian Act), so that it would be the same as if the whole parcel had ceased to exist. In my judgment, it does."

Can it be held that if the buyer were willing to take the portion of the goods, which could be delivered, the seller would be bound to deliver? In *Howell* v. *Coupland*[6] the contract was to sell "200 tons of potatoes grown on land belonging to the defendant in Whaplode". There was a failure of the crop from disease, and the seller could deliver only 80 tons. It was not decided whether the seller might have refused delivery of the 80 tons which he in fact delivered. Blackburn J. and Quain J. seemed to have thought that he was liable to deliver what he could[7]. On the other hand, in *Lovatt Hamilton*[8], where goods were sold "to arrive" by a particu-

1 See Smith v. Hughes (1871), L. R. 6 Q. B 597

2 See Halsbury, Laws of England, 2nd Edn, Vol. XXIX. p. 49.

3 Bell v. Lever Bros. Ltd, (1932) A. C. 161, 217 per Lord Atkin.

4 Strickland v. Turner (1852), 7 Exch. 208; see Halsbury, Laws of England, 2nd Edn, Vol. XXIX, p. 49; Chalmers, Sale of Goods Act, 11th Edn., p. 34

5 (1929) 1 K. B. 574; 98 L. J. K. B. 193.

6 1 Q. B. D. 258, 46 L. J. Q. B. 147 (C. A.).

7. (1874), L. R. 9 Q B. 462; 43 L. J; Q B. 201.

8 (1839), 5 M. & W. 639; 52 R. R. 865.

lar ship, and only a small part arrived in that ship, the Court of Exchequer held that the buyers were not entitled to it, as the contract was entire for the whole quantity" Benjamin observes on this point[1]: "The question is one of the presumed intention of the parties. Where the subject-matter of the sale is such an indivisible whole as a number of volumes forming one work, the intention would doubtless be that the seller should be wholly discharged. The case of a mere quantity of specific goods is not so clear."

Sale of part of an identified stock.

This section only deals with specific goods as opposed to generic goods. It will not therefore apply to unascertained goods and the perishing of such goods will not avoid the contract. It has been suggested that it applies to the case where there is a sale of part of an identified stock out of a larger specified bulk.

Chalmers in his Sale of Goods Act[2] says: 'But if a man contracts to sell five dozen of a particular brand of champagne, it would be immaterial if unknown to him his whole stock of wine had been destroyed by fire He must procure five dozen of that champagne elsewhere or pay damages. A mixed case might arise which is not covered by the section. Suppose a man contracts to sell to B 'five dozen of the 74 champagne now in my cellar' not knowing that all but three dozen had been destroyed by fire. The question has not been decided, but probably the contract would be void[3]."

This involves giving the words "specific goods" a meaning different from that given in the definition, and an agreement to sell goods forming part of an existing stock is not generally regarded as the sale of specific goods[4]. It would be better to say that such a case would fall within the general principles of section 20 or section 56 of the Indian Contract Act than to hold it to fall under this section[5].

Express agreement or usage of a particular trade.

The provisions of this section, like any other implication of law, may be negatived or varied by express agreement, or by the usage of a particular trade[6]. The seller, for instance, may be entitled by custom to appropriate goods to the contract and the buyer may be bound to accept such appropriation although the goods were lost when it was made[7].

C. I. F. contracts.

By virtue of section 62, C. I. F. contracts are saved from the operation of this section[8], in as much as such a contract being a contract for the sale of goods, cost insurance and freight, the performance of which is satisfied by delivery of the

1 Benjamin on Sale, 7th Edn., p. 157.
2 11th Edn., p. 34.
3 This view has been approved *obiter* by Wright J. in Barrow Lane & Ballard v. Phillip (1929) 1 K B. 574; but see In re Wait (1927) 1 Ch. 606, at p. 631.
4 See section 18.
5 See Taylor v. Caldwell (1863) 3 B. & S. 826, 129 R. R. 573; Howell v Coupland (1876) 1 Q. B. D. 258, C. A.; Kimji Lal Manohar Das v. Durga Prasad Debiprasad 24 C. W. N. 703=58 I. C. 761.
6 See section 62 of the Act.
7 Produce Brokers Co. v. Olympia Oil & Cake Co., (1917) 1 K. B. 320, C. A.
8 See notes to section 39 and Appendix.

goods[1] is not affected by the loss or damage to the goods sold.[2] But if before the delivery of documents war breaks out and such delivery becomes impossible of performance the contract becomes void not under this section but under section 56 of the Indian Contract Act, which contains a general provision applying to all the circumstances constituting impossibilities and supervening illegalities avoiding contracts.[3]

Buyer's remedy for the earnest money or the price already paid.

Under S. 65 of the Contract Act when an agreement is discovered to be void or when a contract becomes void, any person who has derived any advantage under it is bound to restore it, or to make compensation for it, to the person from whom he received. The above rule will regulate the rights of the parties when the it is discovered to be void in consequence of the goods having been perished before the contract is made, and the earnest money or price if paid can be recovered back as money paid under a mistake of fact, for the contract in such case is founded on mutual mistake[4].

8. Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Goods perishing before sale but after agreement to sell

Goods perishing before sale but after agreement to sell-analogous law under the English Act.

meaning and scope of section 8

This section applies to goods perishing before sale but after agreement to sell. Unlike the previous section, it deals with a case where the goods are in existence at the time of making the contract, but perish without the fault of either party before the risk has passed to the buyer[5]. Obviously, therefore, it must apply to agreements for sale and cannot apply to executed contracts of sale, as in those cases ownership would pass to the buyer and any subsequent loss will fall on him. "Specific goods" and "fault" are defined in section 2 of the Act.

Like the previous section, this section expressly includes the case of goods which are so far damaged as no longer to answer to their description in the contract. In fact, this section reproduces section 7 of the English Act with the addition of the words "or become so damaged as no longer to answer their description in the agreement"[6].

1 Per Mc Cardie J. in Manbre Saccharine Co v Corn Products Co. (1919) 1 K B. 198 (202)
2 Ibid See also Produce Brokers Co. v. Olympia Oil & Cake Co; supra.
3 [illegible] v. [illegible] Nassiruddin. 40 I. C. 526
4 See also Strickland v Turner, 7 Exch 208, Textile Mfg Co v. Salomon Bros, I. L. R 40 Bom 570.
5 See section 26 of the Act.
6 See notes on pages infra.

° While under the preceding section the contract is void *ab initio*, under the present section it is not so, but performance on either side is excused as from the time of the perishing of the goods.[1] The words "agreement is avoided" mean that the agreement becomes void only when the goods perish, and from that date both parties are absolved from future performance. Any rights vested before that event will not be affected. For instance, if there be a day fixed by the contract for the payment of the price, irrespective of delivery, and the goods do not perish until after that day, the seller may recover it or retain it if already paid. And conversely, where the price is not then payable, the seller takes the risk, and cannot sue for the price[2].

The effect of this section read with other sections of the Act, in cases where specific goods agreed to be sold subsequently perish may be stated as follows :—

1. If fault of either party causes the destruction of the goods, then the party in default is liable for non-delivery or to pay for the goods, as the case may be[3].

2. If there be no such fault, then

(a) if the risk has not passed to the buyer, the agreement is avoided, and the seller is not liable for non-delivery, but on the other hand must bear the loss.

(b) If the risk has passed to the buyer, he must pay for the goods, though undelivered[4].

The rule laid down by this section is only a particular application of the general principle which underlies section 56 of the Indian Contract Act. It deals only with one case of impossibility of performance subsequent to the formation of the contract. There are other cases, common to the whole field of contract, where performance is excused on the ground of impossibility and these are governed by general principles of law of contract As a general rule, if a man makes a contract he must fulfil its conditions or pay damages. It is no excuse that he cannot get the goods he has contracted to deliver, or that he can only obtain them at a prohibitive price. If he wishes to be safe he must protect himself by express stipulation[5].

The rule is for the benefit of seller who would not be liable if the goods perish through no fault on his part. The contract becomes impossible of performance, but under section 65 of the Contract Act he would be bound to return any advantage received by him. But if the risk has passed to the buyer the loss will fall on him.

If the destruction or damage to the goods sold is due to the fault of either the seller or the buyer the party to whose fault it is due must bear the loss caused by such destruction or damage and

1 Cf. Elphick v. Barnes (1880) 5 C. P. D. 321.

2 Cf section 55 (2) ; See also Benjamin on Sale, 7th Edn, p 157, and the cases cited therein.

3 See Act, section 26, post ; and section 31 post, see also Clarke v. Bates (1913) 2 L J Ct. C. 114

4 See Benjamin on Sale, 7th Edn, p 154.

5 See Chalmers, Sale of Goods Act, 11th Edn., p. 35 and the authorities cited therein.

the agreement of sale is capable of being enforced to that extent in an action for damages[1]. If the destruction or damage occurs before the contract of sale is made, section 7 will govern the case. If it occurs after the contract is made but before the risk passes to the buyer, section 8 will apply. Where it, however, occurs after the risk has passed to the buyer the loss must be borne by the buyer.

If the goods are destroyed by *vis major*, or by any other cause, without the fault of either party, before the property in them is transferred, the agreement thereupon ceases to be binding, and the seller and buyer are respectively discharged from the obligation to deliver the goods and to pay the price[2].

Illustrations

The following illustrations will be helpful in understanding the application of this section:

Elphick v. *Barnes*[3], the buyer of a horse on sale or return had eight days in which to return the animal, and it died within the time without his fault. It was held that the seller could not recover the price of the horse in an action for goods sold and delivered, the death of the horse not having deprived the defendant of his option, and thus the sale not being complete,

(2) In *re Shipton Anderson & co.* v. *Harrison Bros.*[4] there was a contract for the sale of a specific parcel of wheat lying in a warehouse, payment to be made within seven days against transfer order, the wheat to remain the property of the seller in the meantime Before the expiration of the seven days the wheat was lawfully requisitioned by the Government It was held that the contract was avoided.

(3) In *Tempest* v. *Fitzgerald*[5] the purchaser of a horse agreed, in August, to give forty-five guineas for it and take it away in September. The parties understood it to be a *ready-money* bargain. The purchaser returned on September 20, ordered the horse out of the stable, mounted and tried it and asked plaintiff's son to keep it for another week which was assented to as a favour. The purchaser said he would call and pay for the horse about the 26th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay *Held*, the contract is avoided and A must bear the loss, for there has been no delivery to the purchaser and no transfer of ownership.

Specific goods.

It has been suggested that in this section also "specific goods" has a wider meaning than that given in the definition and may be extended so as to include unascertained goods which form a part of an identified stock, whether existing at the time that the contract is made or to come into existence thereafter[6]; and this suggestion finds support from the language used by the learned Judges in the

1 Inder Prasad Singh v. Campbell, I. L. R 7 Cal. 474.
2 See Chalmers, Sale of Goods Act, 11th Edn, p. 35.
3 (1880) 5 C. P. D. 321 : 49 L J. C. P. 698
4 (1915) 3 K B. 676.
5 (1820), 3 B & Ald. 680 ; 22 R R. 526.
6 See Chalmers, Sale of Goods Act, 10th Edn., p. 31 ; and 11th Edn, p. 45.

case of *Howell* v. *Coupland*[1]. Blackburn J. described the contract as a contract for the delivery at a future time of a specific thing, so far as this, that it is for, the delivery of a portion of a specific thing, and observed : "It is just like the case of a contract for the purchase of 10 or 100 tons of a cargo of goods out of a particular ship to arrive, which must be so many tons out of the bulk on board the ship named. ...The principle of *Taylor* v. *Caldwell*[2] which was followed in *Appleby* v. *Myers*[3] in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing . . .Had the contract been simply for so many tons of potatoes of a particular quality, then although each party might have had in his mind when be made the conntract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for ; for it would not have been within the rule of a contract as to a specific thing[4]. But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished.[5]"

And Mellish L. J. in the Court of Appeal observed : "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold ; here there was an agreement to sell and buy 100 tons out of a crop to be grown on specific land so that it is an agreement to sell what will be and may be called specific things. Therefore neither party is liable if the performance becomes impossible[6]".

In *Taylor* v. *Caldwell*[7] was an action for breach of a promise to give to the plaintiff the use of a certain music-hall for four specified days, and the defence was that the hall had been burnt down before the appointed day, so that it was impossible to perform the contract. This excuse was held valid.

The principle was thus stated : "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specifed thing continued to exist, so that when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in cause, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

In Hayword Bros. v *Daniel & Sons*[8] there was sale of definite quanities of the produce of the soil but no particular land was

1 See page 95 for facts of this case.
2 (1863) 3 B & S. 826, 129 R. R. 573.
3 (1867) L. R 2 C. P. 651.
4 Cf. Re Thornett & Febr & Yuills (1921) 1 K. B. 219 ; Hayward Brothers v. Daniel (1904) 91 L. T. 319.
5 L R. 9 Q. B. at pp. 465-466.
6 1 Q B D., p. 2[illegible].
7 (1863) 3 B & S. 826, 192 R. R. 573.
8 (1904) 91 L. T. 319.

mentioned. There was a general failure of crop. Held, the goods were not specific and the seller was liable for non-delivery.

In *Appleby* v. *Myers*[1] similarly, the plaintiffs had contracted to erect machinery on the defendant's premises for a price to be paid on completion. During the progress of the work the premises and machinery were consumed, without the fault of either party, by an accidental fire. Both parties were held to be excused from further performance; and the plaintiffs, having contracted for an entire work for a specific sum, could not recover the value of the work actually done, for defendant neither prevented completion nor entered into a new contract to pay for the work partly done.

The opinion of Mellish L. J. in *Howell* v. *Coupland* cited above involved giving to the word "specific" in the section a meaning which differs from that given in the definition clause, but the opinion expressed by Atkin L. J. in, *Re Wait*[2] throws doubt upon the validity of this view. It was suggested by the learned Lord Justice that the decision in *Howell* v. *Coupland* would be covered by section 4 (2)[3], as being a case of an agreement for the sale of future goods, subject to the condition that the subject-matter should come into and continue in existence, or would be covered by general principles of law, retained by section 66[4]. It would, therefore, appear that the section applies only to an agreement for the sale of specific goods, within the meaning of the definition, other cases falling under the general principles of law of contract.

As regards perishing of part, the same principles as under section 7 of the Act will apply.

The price

***9.** (1) The price in a contract of sale may be fixed by the contractor or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. Ascertainment of price

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

1 (1867) L. R. 2 C. P. 651.
2 (1927) 1 Ch. 606, at p. 630.
3 Section 5 (2) of the English Act.
4 Section 62 of the English Act. In India these provisions are contained in section 56 of the Indian Contract Act.

* Section 8 of the English Act, corresponding to this section runs as follows:—

"8. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Repealed section 89 of the Indian Contract Act, 1872, ran as follows:—

"Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the court considers reasonable."

Ascertainment of the price.

"Price" according to section 2 (10) of the Act means the money consideration for a sale of goods. It may be *money* actually paid or promised. It has already been seen that in order that a contract may be a contract of sale, it is essential that it should provide for the payment of a money consideration for the goods. [Vide section 4 (1) of the Act].

Different modes of fixing the price.

This section suggests four methods of fixing the price :—

(1) The price may be expressly stated in the contract. The parties may fix any price they please, and the court will not embark on an investigation as to the adequacy of the price.[1]

As has already been noticed[2] an alternative price, if in the nature of a wager, avoids the contract[3]. An alternative pric ever, does not necessarily involve a bet.[4]

(2) The contract may provide for the manner in which the price is to be fixed. The agreement may be to pay as much for the goods as others pay. In such a case, notice must be given to the buyer as to how much others pay.[5]

Price to be subsequently arranged by the parties

If the parties agree that the price shall be as subsequently arranged between them, no contract of sale exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale[6], and the rule of reasonable price does not apply as the parties have impliedly excluded it. But a contract will exist if an intention can be inferred that at any rate a reasonable price shall be paid if the price is not fixed[7]. If the goods were actually delivered and accepted under such an arrangement, presumably the buyer would have to pay a reasonable price[8].

The clause which ultimately resulted in section 8 of the English Act, originally provided that the price might "be left to be fixed by subsequent arrangement," so that if there was a sale at a price to be subsequently agreed on by the parties there would be a valid contract ; as there is a valid contract of insurance "at a premium to be arranged," for if no arrangement is made a reasonable premium is payable[9]. These words were, however, struck out in the committee[10].

1 Jones v. Gordon, (1877) 2 A. C. 616.
2 See notes on pages 63 to 67.
3 See Bourke v. Short (1856), 5 El. & Bl. 904; cf Brogden v. Marriott (1846), 3 Bing. N. C. 88 ; sale of a horse for £200 if it trotted 18 miles in an hour; if it failed to do so it would be sold for one shilling. Ironmonger & Co. v. Dyne (1928), 44 T. L. R. 497, at p. 499. As to speculative contracts in "futures" see Forget v. Ostigny, (1895) A. C. 318, P. C., at p. 323 ; and Re Gieve, (1899) 1 Q. B. 794, C. A. (wagering contract plus contract for sale of stock).
4 See Cave v. Coleman, 3 M. & R. 2.
5 Murphy v. Hurly, (1922), 1 A. C. 369.
6 Benjamin on Sale, 7th Edn., p. 152 ; See Loftus v. Roberts (1902) 18 T. L. R. 532, C. A. and cases there cited ; cf. Hillas & Co., Arcos Ltd., (1931) 36 Com. Cas. 353.
7 Jewry v. Bush (1814), 5 Taunt. 402 ; Bryant v. Flight (1839), 5 M. & W. 114.
8 Cf. Rose and Frank v. Crompton Bros. (1925) A. C. 444.
9 Marine Insurance Act (1906), section 31.
10 See Chalmers, Sale of Goods Act, 11th Edn., p 38.

(3) The price may be determined by the course of dealing between the parties[1]. Thus in *Browne* v. *Byrne*[2] a usage to deduct discount in determining the price was implied from the course of dealings.

Where no price has been fixed, reasonable price is implied

Where the price of the goods sold is neither fixed by the contract of sale nor there is any stipulation whereby it can be fixed subsequently, the buyer is bound to pay to the seller such price as may be considered reasonable under the circumstances of the case. This rule is based upon the principle that the intention of the parties must be deduced from their conduct and if the parties have not arranged the price, the inference is that they are content to abide by the ordinary rates and to submit to the adjustment of them by the ordinary tribunals[3].

(4) By English law "a contract for the sale of a commodity in e price is left uncertain is, in law, a contract for what the all be found to be reasonably worth"[4], and this applies to *executed* contracts as well as to *executory* agreements[5] *i.e.* to an action for the price of goods sold and delivered as well as to an action for damages for non-acceptance of goods agreed to be purchased. Thus in an executory contract, where no price had been fixed, it was held that the seller could recover, in an action against the buyer for not accepting the goods, the reasonable value of them[6]. Even when the contract is silent as to the method by which the price is to be determined, an agreement to pay a reasonable price will be implied : and what is implied by law is as strong to bind the parties as if it were under their hand[7].

In the words of Wilde C. J , "goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances."[8]

Reasonable price

What is a reasonable price will be a question of fact dependent on the circumstances of each particulcr case. Where the goods are such that there is a market price for them, the market price will be evidence of what is a reasonable price between the parties, though not conclusive. The current price of the day may be highly unreasonable from accidental

Joyce v. Swann, (1864) 144 E. R. 34 ; 142 R. R, 258 ; Anderson v Morice, (1876) 1 A. C. 713.
(1854) 118 E. R. 1304 ; 97 R. R. 715.
Re Anglesey, (1901) 2 Ch. 548 ; agreement to pay interest inferred. Cannon v. Fowler, 14 C. B. 181 : meaning of "fair value" from previous valuation. Charrington & Co. Ltd. v. Wooder (1914) A. C. 91 : meaning of "fair market price," in respect of a tied house. Harrower v. M. William (1928) Sc. Cas. 326 ; meaning of "payment according to B. L. weight."
See Joyce v. Swann, 17 C. B. N. S. 84. Also illustration to section 89, Indian Contract Act, 1872-Appendix B. (Since repealed).
Hoadly v. McLaine (1834) 131 E. R. 982 ; 38 R. R. 510 ; See also Valpy v. Gibson (1847) 4 C. B. 837 ; 72 R. R. 740.
Hoadly v. McLaine, 10 Bing. 482 ; Valpy v. Gibson, 4 C. B. 837 (864).
Hoadly v. McLaine, (1834) 131 E. R. 982 ; 38 R. R. 510.
Hoadly v. McLaine supra the civil law did not recognize this doctrine, and if the contract failed to fix the price, or specify the manner in which it was to be ascertained, it was not a contract of sale See Benjamin on Sale, 7th. Edn., pp. 162-163, and Chalmers, Sale of Goods Act, 11th Edn.: p. 38.
Per Wilde C. J. in Valpy v. Gibson, 4 C. B. at p. 864. Joyce v. Swann, 27 C. B. N. S. at p. 93.

circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes[1]".

Failing evidence of price or value, the court will presume that goods of the lowest value of the kind delivered have been sent[2].

When the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser by ascertaining the amount as nearly as can be. The rules herein contained apply even to a case where the goods are destroyed before the price is fixed, and even in such case, if the risk has passed to the buyer, he must pay a reasonable price. Thus, where the rate has been fixed, but an exact calculation of the price has become impossible by the destruction of the goods, as, for example, where the goods were to be weighed or measured to determine the price, the court would make estimate as it reasonably can.[3]

Generally the price is fixed by the contract of sale itself or some method of its fixation is agreed upon in it which must be resorted to by the parties to ascertain the price. It may also be left to be fixed by a third party which has been specially dealt with in section 10, *infra*. Other methods include by weighment, measurement, counting or testing in which case the standard is generally laid down in the contract itself, and must be followed in fixing the price after such weighment, measurement, counting or testing. But this standard is sometimes not noted in the contract itself and is left to be ascertained from the usage of the trade or course of dealing between the parties, in which case the standard used in such usage or in the previous dealings of the parties is the standard which must be resorted to to fix the price. For instance, where the agreement was for so much a stone and as much more as the buyer gave to others it was held that in fixing the price what the buyer gave to others must be taken into consideration[4]. So also, where the agreement was that the buyer shall pay a "fair value" it was held that the valuation must be based on previous dealings.[5] Similarly, the parties may agree to pay and receive average of weekly official prices[6], or fair market price[7], or that buyer shall pay customs duty and discount will be deducible only on net price[8], or that the price shall be the market value and not cost to seller[9], or that the price stated in the contract will be net cash and no deduction by rebate or otherwise and no credit will be allowed to the buyer.[10] There

1 Acebal v. Levy (1834) 10 Bing. 376; 3 L. J. C. P. 98; 38 R R. 469; Chidambaram Chettiar v. Steel Bros, A. I. R. 1936 Ran. 419=165 I. C. 308 (mixed contract for storage of paddy and subsequent sale at seller's option at the current buying rate of the buyer. In absence of such purchase, price will be reasonable rate)

2 Chunnes v. Pezzey, (1807) 170 E. R. 857.

3 Martineau v. Kitching (1872) L. R. 7 Q. B. 436 at pp. 455, 456: Castle v. Playford (1872), L. R. 7 Ex. 98, at pp. 99, 100.

4 Churchill v. Wilkins, 1 T. R. 447.

5 Cannan v. Fowler, 14 C. B. 181.

6 Shaw's Bro. Iron Co. v. Birchgrove Steel Co., 7 T. L. R. 246.

7 Charington Co. v. Wooder, 29 T. L. R. 145.

8 Smith v. Blandy. (1825) Ry. & M. 257, 260.

9 Orchard v. Simpson, 2 C. B. N. S. 299.

10 Biddell Brothers V. E. Clemente Horst Co., (1911) 1 K. B. 934 C. A.

may be a complete contract of sale so as to pass the property from the seller to the buyer, although the price has not been definitely agreed on between them[1]. In such case price shall be fixed by the course of dealing between the parties and if there is no previous dealing a reasonable price must be paid[2]. So an agreement to pay interest on the price so long as it remains unpaid at a particular rate or for a particular period may be inferred from the course of dealing between the parties.[3]

An agreement to sell is not void, merely because the price is inadequate[4]. The court will not inquire into the adequacy or otherwise of a *bona fide* consideration[5]. Mere difficulty in fixing a reasonable price is no reason for refusing a decree[6].

Underselling.

A man may, of course, sell at any price he likes, and to undersell trade rivals he may offer certain goods at a loss[7]. Similarly, he may engage with a retail dealer that the latter shall sell only at certain listed prices[8]. But that condition is not binding on subsequent buyers, even with notice[9].

Effect of altered custom and excise duties on price.

Customs and excise duties are generally included in the calculation of the price. So, in the absence of a contract to the contrary if, after the price of an article is fixed, a new or increased custom or duty is imposed before delivery and the seller has to pay it he may add the sum to the price already fixed and conversely if the custom or duty is removed or reduced and the seller has to pay less than what was included in the price, the sum removed or reduced may be deducted by the buyer from such price[10]. It has been held under the English law that where there is a dispute as to the amount of custom or duty to be added or deducted the finding of the Revenue Authorities in this respect shall be deemed as conclusive.[11] Thus in a contract for sale of goods, if before goods are tendered custom duty is increased, the seller is entitled to claim the excess duty imposed from the buyer, provided he proves that such excess duty on the goods tendered has been already paid. It is immaterial whether such duty has been paid by the seller himself or that some one else has paid it[12]. In the absence of an agreement to the contrary, where in the interval between the making of the contract and the delivery under it, there is an alteration in the

1 Joyce v. Swann supra.
2 Ibid.
3 Re Anglesey (Marquis) Willmot v Gardener, (1901) 2 Ch. 548 C. A.
4 See Expln. (2) and illustration (f) to section 25 of the Indian Contract Act.
5 Jones v. Gordon (1877) 2 App. Cas. 616, 632, H. L.
6 New Beerbhoom Coal Co. v. Cularam, (1880) 5 Cal. 932.
7 Ajello v. Worsley, (1898) 1 Ch. 274, 280.
8 Sorrell v. Smith, (1925) A. C. 700; Hardie & Lane Ltd. v. Chilton (1928) 2 K. B. 306.
9 See Chalmers, Sale of Goods Act, 11th Edn., p. 39.
10 Conway Brothers & Senage v Mulhern & Co., 17 T. L. R. 730; New Bridge Phondda Brewery Co. v. Evans, 86 L. T. 453; Halsbury, vol. XXIX (2nd Edn.),
11 Halsbury, vol. XXIX (2nd Edn.)
12 Jhamandas Jodhiam v. Tirathdas Deo Mal, A. I. R. 1933 Sind 404=149 I. C. 614.

rate of custom duty, the price may be correspondingly added to, or decreased[1].

Mode of payment.

Price is defined in S. 2 (11) of the Act as the money consideration for a sale of goods. The seller is not bound to accept any kind of payment except in the currency of the country unless there is an agreement express or implied to the contrary or unless the seller is estopped from disputing the mode of payment. He is not bound to accept payment by cheque unless he has accepted cheque on previous occasions and has given the buyer to understand that in future similar payments will be accepted[2].

Legal tender

The price should be in money which is legal tender. In British India under the Indian Coinage Act, 1906, silver rupees half-rupees are legal tenders up to any amount and silver quarter rupees, nickel coins and bronze coins, for any sum not exceeding one rupee. By the Reserve Bank of India Act, 1934, every bank note shall be a legal tender at any place in British India in payment or on account for the amount expressed therein and shall be guaranteed by the Central Government. Bank notes are of the denominational values of five rupees, ten rupees, fifty rupees, one hundred rupees, one thousand rupees and ten thousand rupees. To this has been added bank notes of the denominational value of two rupees. The Central Government have also issued Government of India notes of the denominational value of one rupee, and under Ordinance No. 95 of 1940 any such note is current in British India, in the same manner and to the same extent and as fully as the silver coin called the Government rupee issued under the provisions of Indian Coinage Act 1906, is legal tender in British India for the payment of any amount and is deemed to be included in the expression rupee coin" for all the purposes of the Reserve Bank of India Act, 1934, but this is not to be deemed a currency note for the purposes of that Act.

Rate of exchange

If the contract provides for the payment of price in foreign currency, the Court is to convert the amount payable into rupees, the rate of exchange generally being the rate on the due date of payment, or in case of breach, the rate on the date of breach[1]. In *Barry* v. *Van den Hurk*,[3] on refusal to take delivery of goods sold, note of exchange at the date of breach was held to apply. In an action for recovery of balance of price of goods sold and delivered the rate of exchange on the due date of payment was taken and not on the date of judgment.[4]

Generally speaking, when a claim is converted into the currency of the country the rate of exchange on the date of breach is

1 See Trikam Lal v. Kalidass, (1897) 21 Bom. 628; Probhudas v. Gandidada, A. I. R. 1925 P. C. 157=52 Cal. 644 Cf. Chin Gwan & Co. v. Adamjee, A. I. R. 1933 Ran. 79=146 I. C. 440.

2 Jogat Tarini v. Naba Gopal, (1907) 34 Cal. 305; where tender by cheque was held to be valid; cases considered. International Sponge etc. Co. v. Andrew Watts & Sons 1911 A. C. 279: where payment though directed to be made by crossed cheques there was nothing to indicate to the buyers that the seller's agent was not authorised to receive cash. Mitchell v. Norwich Union (1917) 34 T. L. R. 77.

3 (1920) 2 K. B. 709.

4 (1924) 2. K. B. 166. But see contra Cohn v. Boulken, (1920) 36 T. L. R. 767.

taken. Thus, where there is non-delivery of goods sold, rate of exchange at the date of breach will be taken[1]. The same will apply when there is breach of contract to carry goods and conversion[2]. In *Re British American, etc. B. K.*[3] rate of exchange at the date of the breach or acceptance of repudiation was taken and not at the date of the winding up order. In *Societe de Hotel, etc.* v. *Cummings*[4], in a claim under a foreign contract *e. g.*, in respect of a hotel bill incurred in France) the rate of exchange at the time the action was brought was taken.

10.[1] (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided.

Agreement to sell at valuation

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Price to be fixed by valuation—principle—analogous English law.

This section reproduces section 9 of the English Sale of Goods Act, 1893. Its principle was thus explained by the Special Committee :

"This. . is a corollary to the preceding clause. It is not uncommon for the parties to agree that the price of the goods will be fixed by valuers appointed by them. In such cases they are bound by the bargain, and the price so fixed is as much part of the contract as if fixed by themselves. But it is essential for the formation of the contract that the price should be fixed in accordance with this agreement, and if the parties appointed as valuers fail or refuse to act, the agreement becomes void."

There was no corresponding section in the Contract Act, although the principle on which sub-section (1) of this section is based was covered by section 32 of the said Act.

This section specifically deals with another method of ascertaining the price *viz.* to leave it to be determined by the valuation of a third party. If the persons appointed as valuers fail, or refuse to act, there is no contract[5] in the case of an agreement to sell ; even though one of the parties should himself be the cause of preventing the valuation[6] ; nor can the valuers delegate their

1 Le Beaupin v. Crispin (1920) 2 K B. 714.

2 Re Hodgson & Co. (1920) W. N. 198 ; Di Ferdinando v. Simon (1920) 3 K. B. 409.

3 (1922) 2 Ch. 575.

4 (1922) 1 K. B. 151.

5 See per cur., Loftus v. Roberts, supra.

6 Thurnell v. Balbirnie (1837) 2 M. & W. 786 ; Vickers v. Vickers (1867), L. R. 4 Eq. 529 ; see also Benjamin on Sale, 7th Edn., p. 160.

authority[1]. As contract is avoided by failure to value, so there could not generally be any suit for specific performance of the contract, even though the failure is due to the fault of a party, there being no completed contract[2]. But if the agreement has been *executed* by the delivery of the goods, the seller will be entitled to recover the value estimated to be reasonable, if the purchaser do any act to obstruct or render impossible the valuation, as in *Clarke* v. *Westrope*[3], where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant pending the valuation consumed the goods, so that a valuation became impossible.

And presumably if the proposed buyer has paid any money under it in respect of the goods, he may recover it as on a total failure of consideration. The proviso to sub-section (1) is based upon *Clarke* v. *Westrope*.

Where the defendant contracted to purchase at a price to be ascertained in a specified mode, and no price was fixed in that mode, it was held that as price is of the essence of a contract of sale, there could be no concluded contract which the court could enforce[4].

As regards actual *sale* at a valuation, Benjamin observes[5]:

> "There does not seem to be any authority to show whether, in the case of an actual *sale* at a valuation, the failure of the valuer to act would entitle the seller or the buyer to avoid the contract, and revest the property in the seller. It would probably depend upon the construction of the contract whether the provision for valuation is in this case collateral to the contract, or whether there is an implied condition subsequent justifying avoidance"

In the circumstances mentioned in sub-section (1) the agreement becomes void *ab initio*, so that a buyer who has not been in fault can perhaps recover any deposit paid by him in such a case[6], and the property in goods if vested in the buyer will revert in the seller[7].

If a time is fixed by the contract for the appointment of a valuer, it is usually of the essence of the contract, so that if the valuer is not appointed by that day, the contract is avoided[8].

So long as the sale remains executory there is no contract if the valuers fail or refuse to act[9] even though such refusal is unreasonable.[10] The court can neither compel a defendant to name another valuer nor compel the valuer to make the valuation or the buyer to buy at any other price[11].

Where no valuation takes place in pursuance of an agreement to sell at valuation, there being no contract, equity cannot decree

1 Ess v. Truscott (1837), 2 M. & W 385 ; 46 R. R. 630.
2 Vickers v. Vickers (1867) L R. 4 Eq. 529, 535.
3 (1856), 18 C. B. 765 ; 107 R. R. 507.
4 Milnes v. Gery, (1807) 33 E. R. 574 ; 9 R. R. 307.
5 Benjamin on Sale, 7th Edn., p 160.
6 See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 52.
7 Benjamin ; Remfry, p. 576.
8 Tew v. Harris (1847) 11 Q. B. 7, 75 R. R. 270; see Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 52.
9 Cooverji Lodha v. Bhumiji 6 Bom. 523; Cooper v. Shuttleworth, 25 L. J. 114.
10 Worsley v. Wood, 6 T. R. 710.
11 Wilks v. Davis, 2 Mer. 507 ; Darbey v. Whitaker, 4 Drew. 134 ; Vickers v. Vickers, 25 L. J. C. N. 287.

specific performance[1], though in cases where the court is of opinion that the appointment of the valuer is not of the essence of the contract (as in an agreement between partners that one shall take over the assets of the partnership from the other at a valuation) it may ascertain the value for itself and decree specific performance after so ascertaining the price[2]. In appropriate cases too it may make a mandatory order on the party obstructing the valuation to allow the valuation to proceed. Thus, where the seller refused permission to the valuer appointed to enter his premises for the purpose of valuing the goods, a court of equity in a suit for specific performance made a mandatory injunction to compel the seller to allow him to enter[3]. In this case there was an agreement for the sale of a house at a fixed price and of the pictures and furniture therein at a valuation by a person named by the parties.

Completion of valuation

The valuation is completed if everything necessary for the valuation has been ascertained and it only remains to calculate the price mathematically[4]. It may, however, be questioned if the valuer has proceeded on a wrong standard, or taken into account things which by the ageement ought to have been omitted. The valuation made by the valuer is final, but the parties would not be bound by the valuation if the valuer acts improperly or, if it is procured by fraud[5].

Valuation is not arbitration.

Valuation must be distinguished from arbitration, as a reference to arbitration could only be made when there is a dispute between the parties[6]. But even where a question of fixing of price is involved, there may be an arbitration, as distinguished from a mere valuation, as where different prices are offered by two parties, and a third person is to decide[7]. On the other hand, a valuation may be included in an arbitration[8]. The court has no power to appoint a valuer if the valuer selected by the parties refuses or in unable to act, or where the parties are to nominate valuer, they or any of them refuse to do so.

The guiding principles whereby to distinguish a valuation from an arbitration were laid down by Lord Esher, M. R. in *Re Dawdy*[9]. and in *Re Carus Wilson* cited above.

> "If a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that, in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially, he is using the skill of a valuer, not of judge[10]".

1 Vickers v. Vickers (1867) L. R. 4 Eq. 529.

2 Dinham v. Bradford (1870) L. R. 5 Ch. App. 519.

3 Smith v. Peters (1875) L. R. 20 Eq. 511,

4 Gordon v. Whitehouse (1856) 18 C. B. 747.

5 See Shipway v. Broadwood, (1899) I. Q. B. 369. C. A.

6 Bos v. Helsham (1866) L. R. 2 Exch. 72 ; 2 Digest 324 ; Re Carus Wilson and Greene (1886), 18 Q. B. D. 7 C. A.; 39 Digest 418.

7 Thomson v. Anderson (1870), L. R. 9 Eq. 523 ; 2 Digest 320.

8 Stewart v. Williamson (1910) A. C. 455.

9 (1885), 15 Q. B. D. 426.

10 Re Dawdy, supra.

Valuation by two valuers.

Where under the agreement each party is to appoint a valuer, it is essential to the validity of the appointment that notice thereof should be given to the other party[1]. A valuation by one valuer only in such a case is no valuation, unless it is expressly agreed that if one of the parties fails to appoint a valuer, or that valuer refuses to act, or is prevented from acting, the valuer appointed by the other party may make the valuation by himself[2]. In such cases the agreement generally provides that if the two valuers cannot agree on the value, they may refer the matter to an umpire, but even in such a case the reference to the umpire does not of itself amount to a submission to arbitration, and his decision is not necessarily an award[3].

In *Thurnell* v. *Balbirnie*[4] goods sold were to be valued by two named valuers. One of them refused to value whereupon the other valued the goods alone and an action was brought for not taking the goods and paying the price so fixed. Held that there could not be an action for price unless they had been valued by both the valuers, at least without an averment that the other party refused to permit the valuer to value.

In *Milnes* v. *Grey*[5] each party was to appoint a valuer. An action for specific performance praying that the court will appoint a valuer was dismissed.

If the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties[6]. But there is no implied undertaking on the part of the person appointing the valuer that the valuer shall make the valuation and the valuer of one party is not liable to the other party if the valuer does not act in the valuation and no right of action lies against a party who appoints a valuer who refuses to act[7]. The appointment of a valuer is irrevocable[8].

In order that a valuation made by a valuer may be binding on the parties to the contract of sale he must act fairly and properly[9]. If the valuer acts in collusion with one party that party cannot sue on his valuation[10]. The valuer must act honestly and impartially to the best of his ability and must apply his mind to the point for decision[11]. So long as he fulfils these conditions it is no valid objection to his valuation that he is a servant of one of the parties[12]

1 Thomas v. Fredricks (1847) 10 Q. B. 775, 74 R. R. 502 ; Tew v. Harris (1847) 11 Q. B. 7, 55 R. R. 270.

2 Tew v. Harris, supra.

3 Re Carus Wilson and Greene, supra.

4 (1837) 2 M. & W. 786.

5 (1807) 14 Ves. 400.

6 Jenkins v. Betham (1855), 15 C. B. 169 ; 100 R. R. 297 ; Cooper v. Shuttleworth (1856), 25 L J. Ex. 114 : 105 R. R. 346.

7 Cooper v. Shuttleworth, supra.

8 Mills v. Bayley (1863), 2 H. & C. 36 ; 133 R. R. 579 ; and Benjamin on Sale, 7th Edn. p. 162.

9 Emery v. Wase, 8 Ves. 505; Chichester v. McIntire, 4 Bli N. S. 78 ; Bombay-Burmah Trading Co, v. Aga Mohammad, 15 C. W. N. P. C.

10 Shipway v. Broadwood, (1899) 1 Q. B. 369 C. A. ; v. Batterbury Vyse, 32 L. J. Ex. 117 ; Panama Co v. India Rubber Co., L. R 10 Ch. 515.

11 Bombay-Burmah Trading Co. v. Aga Mohammad, 15 C. W. N. 981 P. C. see also Re Enoch, (1910) 1 K. B. 387.

12 Eckersley v. Mersey Docks, (1894) 2 Q. B. 667.

in as much as the parties may make one of themselves a judge in his own cause[1].

Sub-section (2).

If one of the parties wrongfully prevents the valuation from taking place, the party not in fault may maintain a suit for damages against the party in fault. This sub-section is an instance of the application of the rule that neither of the parties to a contract can by his own act or default defeat the obligations he has undertaken to fulfil[2]. Where the valuer is prevented from making the valuation as agreed, by the fault of the seller or the buyer, the other party not in fault may maintain a suit for damages against the party in fault[3] or for an injunction against such party restraining him from preventing the valuer to make the valuation[4].

Conditions and Warranties

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Stipulations as to time

Analogous law.

This section corresponds to sub-section (1) of section 10 of the English Act—See Appendix A. Sub-section (2) of the same is omitted as it contained only a definition of "month" which is defined in the General Clauses Act, 1897 [vide section 3 (33) of the same]. The principle underlying this section is found in section 55 of the Indian Contract Act, 1872, (See Appendix B) of which this section is only a corollary specially applicable to the contracts of sale of goods. It will be observed that section 11 of the present Act in a way only supplements section 55 of the Contract Act, in as much as resort must be had to the provisions of the latter in order to determine the question of the effect of stipulations of time on the right, duties and liabilities of the parties consistently with the other provisions in the Sale of Goods Act there being no other provisions in that Act relating to the effect of the stipulations as to time and the provisions contained in section 55 of the Contract Act not appearing inconsistent with any other provisions of the Sale of Goods Act. Section 11 of this Act in fact supplies the want, there being no provision in the Contract Act to determine when time is of the essence of contract and when not.[5]

Conditions and warranties in general.

The parties are at liberty to enter into a contract with any terms they please. In the case of a sale of goods, the ordinary

1 Secty. of State for India v. Arathoon, 5 Mad. 173 ; Aghor Nath Banerjee v. Calcutta Tramways, 11 Cal. 232.
2 Sailing Ship Blairmore Co. v. Macredie (1898) A. C. 593, at p. 607.
3 Thomas v. Fredricks, 10 Q. B. 775.
4 Smith v. Peters, L. R. 20 Eq. 511.
5 Ma Pwa Shiv v. Ramen Chetty, 2 L. B. R. 99 (100).

principle is *caveat emptor*, "purchaser beware". But, the purchaser before purchasing may satisfy himself as to the right quality of goods. Where representations are made by the seller with reference to the goods sold, and if such representations find a place in the contract, may rank either as conditions or as warranties. Section 12 of the Act clearly brings out the distinction between a warranty and a condition, and both of these must be distinguished from mere representations which do not form part of the contract. This subject will be dealt with under next section.

Stipulations as to time of payment.

Section 11 lays down that 'unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.' The parties may, however, intend otherwise[1] and the terms of the contract may make the time of payment an essential condition. To prove that it was so there must be clear evidence of intention to that effect. The court would examine each case on merits to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. Where there is nothing to warrant such inference, the mere fact that the contract contains a stipulation as to the time of payment will not make it of the essence of the contract[2]. If the parties want that they should be considered as of the essence of the contract they must include in the contract such terms as may lead to a reasonable inference that this was the intention of the parties.

The rule in this section is based on the principle that failure in punctual payment does not go to the whole consideration for the sale and it is very seldom that mercantile contracts are made conditional on payment, payment generally being considered to be made after the contract is completed. The failure by the buyer to pay on the appointed day does not, as a rule, entitle the seller to treat the contract as repudiated[3], though he may be entitled to withhold delivery until the price is paid and resell the goods if the buyer does not pay or tender the price within a reasonable time[4]. Consequently if before such re-sale the buyer tenders the price, even though it be on a date after the date named in the contract the seller cannot, in the absence of a stipulation to the contrary, treat the contract as at an end and refuse to allow the buyer to have the goods; and a subsequent re-sale by him will be tortious[5].

1 Bishop v. Shillito (1819) 2 B. & Ald. 329, Ebbw Vale Co. v. Blaina Iron and Tinplate Co. (1901) 6 Com. Cas. 33 C. A.; Ryan v. Ridley; (1902) 8 Com. Cas. 105; Thames Sack Co. v. Knowles (1918). 88 L. J. K. B. 585.

2 See Martindale v. Smith (1841) 1 Q. B. 389; Mersey Steel & Iron Co. v. Naylor, Benzon & Co., 9 App. Cas. 434.

3 Martindale v. Smith (1841) 1 Q. B. 389, at p. 395; 55 R. R. 285. 289; Mersey Steel and Iron Co. v. Naylor (1884) 9 App. 18 Cas. 434, at p. 444; Payzu Ltd. v. Saunders (1919) 2 K. B. 581 C. A., Maples Flock Co. v. Universal Furniture Products (1934) 1 K. B. 148.

4 See sections 47 and 48.

5 Martindale v. Smith, supra; Mersey Steel and Iron Co. v. Naylor, supra; Payzu Ltd. v. Saunders, supra; See Sale of Goods Act by Mulla and Pollock, p. 66.

The following illustrations will make the point clear :

(1) Six specific stacks of oats had been sold by Smith to Martindale, to be paid for on July 16. Smith afterwards told Martindale that if he failed to pay on the very day he should not have the oats. Martindale did not pay on July 16, but tendered the price shortly afterwards. Smith, however, subsequently sold the oats to another. *Held*, that Martindale's mere failure to pay on the 16th did not justify Smith in repudiating the contract ; he was not bound to deliver without a tender of the price, but this condition having been fulfilled, the subsequent resale was tortious, and he was liable in trover[1].

(2) In *Ryan* v. *Ridley & Co.*[2], there was a sale of a perishable cargo c. i. f. Lisbon. Payment was to be made by cash in London in exchange for bill of lading and insurance policy. Shortly after the arrival of the ship at Lisbon the seller tendered the documents to the buyer in London, but the buyer failed to pay. *Held*, that the seller was entitled to treat the contract as repudiated, time being the essence of contract.

(3) In *Mersey Steel and Iron* Co. v. *Naylor*[3], the defendants had agreed to purchase from the plaintiffs 5,000 tons of steel blooms, "delivering 1,000 tons monthly, commencing January next, payment net cash within three days after receipt of shipping documents". The plaintiff company delivered about half of the first instalment, but before payment became due a winding-up petition was presented. Thereupon the defendants, acting under a mistake of law, refused, pending the bankruptcy petition, to pay for the steel, already delivered. The plaintiffs thereupon informed the defendants of their intention to treat the refusal to pay as a breach of contract releasing them from any obligation to make further deliveries. The defendants afterwards offered to accept and pay for all other deliveries subject to a right of set off which they claimed. The plaintiffs, however, declined to make further deliveries, and brought their action for the price of the steel delivered. *Held* (1) that on the construction of the contract payment for a previous delivery was not a condition precedent to the right to claim subsequent deliveries ; (2) that the defendants had not by postponing payment under mistaken advice acted so as to show an intention to repudiate the contract and thereby to release the plaintiff company from further performance.

(4) *Bishop* v. *Shillito*[4] was trover for iron that was to be delivered under a contract which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery, and brought *trover* for what had been delivered. On facts it was found that the delivery of the iron and the redelivery of the bills were to be contemporary. *Held*, that on facts the delivery was conditional only, and the condition being broken, trover would lie. Bayley J. observed: "If a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money,

1 Martindale v. Smith, 1 Q. B. 389, 55 R. R. 285.
2 (1902) 8 Com. Cas. 105.
3 (1884) 9 App. Cas. 43, see section 38 (2) of the Act.
4 2 B. & Ald. 329.

he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

(5) In *Woolfe* v. *Horne*[1], purchaser at an auction sale failed to take away the goods on Saturday which was the last day fixed but claimed them two days later when he found that the goods had been delivered to another person. *Held*, that the condition as to clearing the lot within three days was not a condition precedent to the buyer's right to claim delivery.

(6) In *Thames Sack, etc. Co.* v. *Knowles*[2] under a "spot" contract (which meant that the goods were available and ready for delivery) delivery and payment were to be by a certain date, up to which time the risk would be with the seller. The buyer failed to pay on that date but tendered the price the next day. Held, time was of the essence of the contract under the circumstances of the case and the seller was entitled to cancel the contract.

Where the contract is for delivery of goods by instalments, each instalment to be paid for on delivery, failure to pay for one instalment may entitle the seller to repudiate the contract[3].

In a. c. i. f. contract, where the stipulation is cash against documents, a refusal by the buyer to pay on tender of the documents will entitle the seller to treat the contract as repudiated and immediately to sue the buyer for non-acceptance[4].

Other stipulations regarding time.

This section provides that 'whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract'. Generally speaking stipulations regarding time other than those relating to time of payment, such as for delivery of goods, are deemed to be of the essence of the contract in mercantile transactions. As was observed in *Bowes* v. *Shand*[5]:

"Merchants are not in the habit of placing on their contracts stipulations to which they do not attach some value and importance."

As a general rule in metcantile contracts, such as contracts "f. o. b." and "c. i. f." the time of shipment or delivery is of the essence of the contract[6] strict performance of which is a condition precedent to the claim for price. The reason for the general rule is obvious. A mercantile contract is not always an isolated transaction, but a link in a chain of transactions and if A does not keep his contract with B, then B may not be able to keep his contract with C, so that

1 (1877) 2 Q. B. D. 355.
2 (1918) 88 L. J. K. B. 585.
3 See section 38 (2) of the Act. Ebbw Vale Co, v. Claina etc. Co., (1901) 6 Com. Cas. 33 ; payment for each instalment as a condition precedent to further deliveries.
4 Biddell Brothers v. E. Clemens Horst & Co. (1912) A. C. 18 ; Ryan v. Ridley, supra.
5 (1877) 2 A. C. 455 ; Sri Krishna Khanna, In re (1934) Sind. 39 = 148 I. C. 977 ; Sanders v. Maclean, (1883) 11 Q. B. D. at p. 337.
6 Halsbury, Laws of England, 2nd Edn., Vol. XXIX. p. 56 ; Reuter v. Sala (1879) 4 C. P. D. 239, 246, 249, C. A. (Sale of pepper) ; Sharp v. Christmas (1892) 8 T. L. R. 687 (Sale of potatoes).

punctual performance may go to the whole cousideration for the sale[1].

In *Payton & Sons* v. *Payne & Co.*[2] it was, however, held that in a contract for the sale and delivery of a printing machine time was not of the essence of the contract.

Reference has already been made[3] to stipulations contained in a contract of sale of goods "to arrive", and their interpretation. Other stipulation may be as to the date of shipment[4], as to the date that a bill of ladidg bears or shall bear[5], or as to the date of the clearance of the ship on which the goods are loaded[6], and these are usually of the essence of the contract.

The following illustrations will be found helpful:

Sale of goods "to be shipped" within a certain time.

(1) In *Bowes* v. *Shand*[7] the contract was for the sale of 600 tons of "Madras rice to be shipped at Madras or coast during the months of March and [or] April, 1874, per *Rajah of Cochin*." By far the larger portion of the rice was put on board in February, and bills of lading for various portions were given upon the 23rd, 24th, and 28th of February, and 3rd of March, but all except a very small portion of the parcel shipped under this last bill of lading also had been put on board in February. There was nothing to show that the words "to be shipped during the months of March and [or] April" had in the trade any special or technical meaning. It was held that the natural meaning of the stipulation as to time was that *the whole* of the rice should be put on board *during* the months mentioned; and that, in the absence of any trade usage to effect the meaning of the words, it was for the court to construe the contract.

(2) In *Aron* v. *Comptoir Wegimont*[8] a contract of sale of cocoa powder, c. i. f. Antwerp. provided for "shipment from U.S.A. ports during October, 1919," and it contained a clause that "whatever the difference of the shipment may be in value from the grade, type or *description* specified, any such question shall not entitle the buyers to reject the delivery or any part thereof." The goods were not shipped until November and the buyers rejected the documents when tendered It was argued for the seller that the date of shipment was part of the "description" of the goods and therefore under the clause mentioned the buyers were not entitled to reject. Mc Cardie J. observed :

"I agree in one sense the time of shipment is part of the description of the goods. Indeed, in *Bowes* v. *Shand*, Lord Cairns said, 'That is part of the description

Halsbury, Laws of England, 2nd Edn, Vol. XXIX, p. 57; see also Volkart Bros. v. Ratnavelu, (1894) 18 Mad. 63; Balaram v. Govinda (1925) Mad. 1232 =91 I. C. 257; Bhudar Chandra v. Betts, 33 I C. 347; Baij Nath v. Johar Chand, A. I. R. 1933 All 404=144 I. C. 82; Delhi Cloth Mills Co. v. Kanhia, 80 P. R 1913=19 I. C. 93.

(1897) 35 S. L. R. 112, an isolated transaction.

See pages 96 to 98.

Bowes v. Shand (1877) 2 App. Cas. 455; Aron & Co. v. Comptoir Wegimont (1921) 3 K. B. 435. As to the meaning of "shipment" see Mowbray Robinson & Co. v. Rosser (1922) 91 L. J. K. B. 524 C. A; Foreman & Ellams v. Blackburn (1928) 2 K. B. 60.

(1877) 2 App. Cas. 455; 46 L. J. Q. B. 561.

(1921) 3 K. B. 435; 90 L. J. K. B. 1233.

(1877) 2 App. Cas. 455; 46 L. J. Q. B. 561.

of the subject matter of what is sold'. So it is I agree, but the express requirement of a contract that goods shall be shipped at a particular period is a good deal more than a mere description of the goods within section 13 of the Sale of Goods Act 1893 (corresponding to section 15 of the Indian Act); it is an express term of the contract independent of that which is generally known as the description of the goods. It is I think, a condition precedent that the goods shall be shipped as required by the contract."

Date of bill of lading a condition

(3) Sale of goods to be shipped and bill of lading to be dated December-January. Goods were shipped on January 30th but the bill of lading was dated February 22nd. The buyer may reject the shipment, the stipulation regarding the date of the bill of lading being a condition precedent.[1]

Seller to give notice in sales "to arrive."

(4) In sales of goods "to arrive," it is quite a usual condition that the seller shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract[2].

"Clearance" by a certain time

(5) Another stipulation as to time when goods are to be shipped is that the ship should be "cleared" by a particular date. Clearance means a compliance with custom regulations so that the vessel is authorised to sail.[3]

(6) In ordinary commercial contracts for sale of goods, time is *prima facie* of the essence with respect to delivery[4]. *Shaw* v. *Bill* (1884) 8 Mad. 38, 58 : presence of the vessel at port in a particular month was not essential. *Buch* v. *Gordhandas* (1922) 24 Bom. L. R. 911 ; "shipment from October approximately", did not mean "October shipment." *Winshurst* v. *Deeby* (1845) 2 C.B. 253 : time of delivery of engine to be fixed to the ship. See *Norrington* v. *Wright* (1885) 115 U.S. 188 ; "a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a condition precedent." *Sanday & Co.* v. *Keighley, Maxtead & Co.* (1922) 27 Com. cas. 296 : "expected to be ready to load late September ;" but the ship was not ready to load till middle of November. Buyer was not bound to take. *Juggernath* v. *Maclachlan* (1881) 6 Cal. 681 : "delivery was to be taken and given in, the whole of November on seven day's notice from the buyer." Held, under the contract the buyer had the right of fixing the particular time in November at which the delivery was to commence, and the seller was bound to commence delivery on the expiration of seven days' notice.

So also when the seller is to declare the name of the vessel or vessels or other particulars relating to the goods within a specified time it should be strictly complied with. These particulars are necessary to enable the buyer to effect sub-sale. *Reuter* v. *Sala* (1879) 4 C.P.D. 246 : name of vessel or vessels, marks and particulars

Re General Trading Co. & Van Stolk's Commissiehandel (1911), 16 Com Cas. 95 ; see also Finlay v. Kwik, (1929) 1. K. B. 400 (C. A.) ; 98 L. J K. B. 251 ; Berg & Sons v. Landauer (1925) 42 T. L. R. 142 ; statement of the date of the bill of lading in the provisional invoice was a condition.

See Reuter v. Sala (1879), 4 C. P. D. 239 ; Busk v. Spence (1815) 4 Camp. 329 ; Graves v. Legg, (1845) 9 Ex. 709 ; 96 R. R. 931.

See Thalmann v. Texas Star Flour Mills, 82 L. T. 833 ; Kidston & Co. v. Monceau Ironworks Co., 86 L. T. 556.

Hartley v. Hymans (1920) 3 K. B. 475 ; Bhudar Chandra v. Betts (1915) 22 Cal. L. J. 566.

to be declared within sixty days of date of the bill of lading *Graves* v. *Legg* (1854) 9 Ex. 709 : declaration of the name of the ship to buyer's broker was held notice to the buyer. *Kidston & Co.* v. *Monceau Ironworks* (1902) 86 L.T. 556 where the delivery of specification by the time mentioned was not in the circumstances a condition precedent. *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327 : documents should be sent as soon as possible after shipment. *Barber* v. *Taylor* (1839) 9 L J.Ex. 21 : buyer was entitled to reject as the bill of lading was not delivered within a reasonable time after its receipt by the seller.

As is evident from the observations of McCardie, J. in *Aron & Co.* v. *Comptoir Wegimont, supra*, that stipulations as to time, such as the time of the shipment or delivery, are distinct from the description of the goods, and are treated separately both by the English Act and this Act Thus, a buyer, notwithstanding the clause precluding him from rejecting the goods for errors in the description, might reject the goods, for instance on the ground that they were shipped late.

It is also to be remembered that although the courts of equity in England in dealing with contracts for the sale of land do not regard time of the essence of the contract except in peculiar circumstances, this is not applicable to mercantile contracts relating to goods [1]

Where time is of the essence of a contract for the sale of goods, the seller is entitled on the buyer's default to put an end to the contract even though the property in the goods has been transferred to the buyer.[2] Even where time is not of the essence, a contract must be performed within a reasonable time, and, if there is unnecessary delay by one of the parties, the other party may give him notice fixing a reasonable time at the end of which he will treat the contract as broken.[3]

English Common Law generally deemed stipulations as to time to be of the essence of the contract On the other hand, in the case of contract subject to jurisdiction of the Court of Chancery such stipulations were *prima facie* deemed to be not of the essence of the contract, unless made so either expressly or by necessary implication. It is this rule of the English Chancery Court that is stated in the first clause of this section[4].

Time is always considered of the essence of the contract in the following cases :—

(1) Where the parties have expressly agreed to treat it as of the essence of the contract.

(2) Where delay operates as an injury.

(3) Where the nature and necessity of the contract require it to be so construed[5].

1 See remarks of Cotton L J. in Reuter v. Sala (1879) 4 C. P. D. 239, at p. 249, C. A.

2 Buldeo v. Howe (1881) 6 Cal. 64.

3 Stickney v. Keeble (1915) A. C. 386.

4 See Kishen Prasad v. Purnendu Narain, 16 C W. N. 753.

5 Story on Contract, S. 970.

A new agreement extending the time of performance is evidence that the parties considered time as of the essence of the contract otherwise there would have been no need for such agreement.[1]

It has been held that excepting the case of stipulation as to time of payment, in every other case whenever a specific time is fixed it is presumed to be of the essence of the contract and the burden of proof that it is not so lies on the person who claims a departure from the rule to show that it is not of the essence of the contract.[1] A distinction is, however; drawn between the contracts of sale of goods and those of the sale of land. In the latter class of cases the presumption generally is that the time, even if specified in the contract, is not of the essence of the contract and specific performance of them can be sought even after such time has passed.[2] These cases should be carefully distinguished from those of the former class in as much as they are not good law under this Act which relates only to the sale of goods.

Effect of waiver of the stipulations

Like any other condition, stipulations as to time may be waived by the party in whose favour they are inserted either expressly or by implication. After such waiver he has no right to rescind the contract on the ground waived [3]

Meaning of "month."

In British India by the General Clauses Act, 1897 [S 3(33)], it is provided that the word "month" when used in an Act, shall mean a month reckoned according to the British Calendar.' Again, S. 25 of the Indian Limitation Act provides that "all instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian Calendar."

It does not follow that when a particular word in an Act is to be construed as having a particular meaning, the same meaning should be given to it when used in a contract. The present Act is silent as to the meaning of the word 'month' when used in a contract of sale of goods. In India there are various calendars in use and in computing time regard should be had to the intention of the parties in this respect. In *South British Insurance Co* v *Brajanath*[4] the policy of insurance provided that no suit or action thereunder should be sustainable unless commenced within six months next after any loss. It was held that month meant, as under English common law, lunar month though in that case it was not necessary to construe the word month as the suit was out of time whether month meant lunar month or calendar month. See *Roshan Ali* v. *Chaudhuri Basir Ahmad*[5] where a special reference was made in the contract to Hindi calendar, a case under the Limitation Act.

1 Marshall v. Powell, 4 A. & E. (N. S.) 779.
2 Jamshed Khodai Ram Irani v. Bur Jorji Dhunjibhai, 40 Bom. 289 P. C.
3 See Levey v. Goldberg, (1922) 1 K. B. 688 ; Muhammad Habibullah v. Bird & Co., (1921) 43 All. 257 ; Hickman v. Haynes (1875) L. R. 10 C. P. 598 ; Potts & Co. v. Brown, Macfarlane & Co. (1925) 30 Com. Cas. 64, H. L.
4 (1909) 36 Cal. 516.
5 (1924) 47 All. 66.

When computing number of days within which the performance is to be made it is usual to exclude the day of the contract.[1] Delivery in two months from 5th October is fulfilled by delivery at any time on the whole day of the 5th of December.[1]

S. 10 (2) of the English Act provides that in a contract of sale, "month" means *prima facie* calendar month.

Stipulation as to time whether a condition or a warranty.

It is thus clear from what has been stated above that where the stipulation as to time is of the essence of the contract it is a condition while where it is not of the essence of the contract it is only a warranty. In the former case the other party can treat the contract as repudiated and is entitled to rescind it on that ground.[2] In the latter case the other party cannot avoid the contract but can only claim compensation for delay as in the case of the breach of a warranty[3]. In the former case, however, if the promisee accepts performance of the contract at any other time he cannot claim compensation for delay whatever loss might have been caused to him thereby, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.[4] His mere acceptance amounts to the waiver of such right[5] unless he gives notice to the other party that he accepts it subject to his right to claim compensation for the loss caused to him by delay in the performance. So, where the plaintiff promised to pay the price and the defendant to deliver the goods on a given day. and it was found that the time specified in the contract was of the essence of the contract it was held that if the buyer was not ready and willing to pay the price at the time agreed upon, the seller had a right to rescind the contract and to refuse to deliver the goods[6]. The rules, herein stated, apply equally to contracts where property in the goods has passed to the buyer as well as to contracts where it has not passed.[7] In the absence of statutory provision or trade custom or usage, the fact that the performance of the contract falls due on a holiday. does not alter the rights of the parties by suspending the transaction of private business and a seller is bound to establish not only that he was entitled to perform the contract on the day following the holiday by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties, but also that such usage when read into the written contract does not make it insensible or inconsistent[8].

12. (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. **Conditions and warranties**

(2) A condition is a stipulation essential to the

1 Caddington v. Dabologo L R. 2 Ex. 193.
2 See also Doulatram v. Ali Bhai, 33 I. C. 668.
3 Ibid.
4 See S. 55, Clause 3, Indian Contract Act, and S. 12 infra.
5 Parbhu Ram v. Mst. Jheso, 43 I. C. 408 (Pat.).
6 Baldeo Das v. Howe, 6 Cal. 64.
7 Ibid.
8 Kasiram v. Harnandray, 58 I. C. 396 (Cal.).

main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.*

Conditions and warranties.

A contract of sale may be absolute or conditional[1]. A stipulation in a contract of sale with reference to goods which are the subject thereof may be either a condition or a warranty. The present section draws a clear distinction between the two.

There is no definition of "condition" in the English Act but "warranty" is defined in S. 62 in identical language. In the Indian Contract Act the word "warranty" has been used without any definition, and also indiscriminately both in the sense of a *warranty* proper or a condition (*i.e.* S. 118). The result has been to treat a particular stipulation in a contract as a condition or warranty according to the intention of the parties[2].

In the English law the distinction between stipulatious which are essential and those which are non-essential has been well recognised, though the use of the words 'condition' and 'warranty' has not been consistent. "From a very early period of our law it has been recognised that all obligations are not of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any of them entitles the other to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to

***Analogous law.**

Section 11 (1) (b) of the English Sale of Goods Act, 1893, which is as follows:

"Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

1 Section 4 (2) of the Act.

2 See Buch v. Gordhandas A. I R. 1923 Bom. 92=(1922) 24 Bom. L. R. 991=70 I. C. 877 ; Nagardas v. Velmahomed, A. I. R. 1930 Bom. 249. See the definition of "warranty" given in the notes on Cutter v. Powell in 2 Sm. L. C. 7th ed., p. 30.

perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognising this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term 'condition' to describe an obligation of the former class and 'warranty' to describe an obligation of the latter class[1]."

The reason why the word "condition" does not appear in the Indian Contract Act and has not been defined in the English Act is that the word has been used in many other connections and has a considerable variety of meanings. The definition of 'warranty' in the English Act, which is adopted here was adopted from the notes to *Cutter* v. *Powell*[2]. As regards the definition of the term 'condition' in this section the word 'essential' has been borrowed from the classical judgment of Williams J. in *Behn* v. *Burness*.[3] The Indian Legislature has defined 'condition' and has distinguished between 'condition' and 'warranty' to bring the law in India in harmony with that in England, on this point, and to give to the Indian Courts the guidance of the decisions of the English Courts[4]. Sub-section (4) of this section corresponds to clause (b) of section 11 of the English Act.

Nature and scope of section 12

Section 12 of the Act is purely declaratory in its character. It classifies the stipulations relating to the goods which form the subject matter of a contract into two classes, namely, conditions and warranties. It is confined to the conditions and warranties given in respect of the goods which are the subject of reference. It does not take note of other contingencies or conditions which the parties to the contract of sale may choose to make their contract subject to. These conditions and warranties or contingencies will be regulated as before by the general law of contract as contained in the unrepealed portion of the Indian Contract Act, 1872, so far as they are consistent with the provisions of this Act[5]. It however appears that the principle which provides this section and draws a distinction between a condition and a warranty as to the effect of their breach on the contract will also govern the conditions and warranties given by the buyer to the seller and which the former is required by the contract to fulfil.

A stipulation in a contract of sale with reference to goods which form its subject matter may be either essential to the main purpose of the contract or only collateral to it. Where it is essential to the main purpose of the contract it is a 'condition' and its breach gives rise to a right to treat the contract as repudiated. Where it is only callateral to the main purpose of the contract, its breach does not defeat the purpose of the contract, and it gives rise to a claim for damages but not to a right to reject the goods and treat the

Per Fletcher Moulton L. J. in Wallis v. Pratt, (1910) 2 K B. at p. 1012, approved by the House of Lords in 1911 A. C. 394. See also Heilbut & Co. v. Buckleton, (1913) A. C. 30.

2 Smith's Leading Cases, (7th Edn.) p. 30.

3 (1863) 32 L. J. Q. B. 204.

4 See Special Committee's Report, Appendix C., note on clause (12).

5 Vide section 3 of the Act.

contract as repudiated. Whether a stipulation is a condition or warranty depends on the true construction of the contract, and is not a question of nomenclature. A so-called warranty may be in fact a condition. 'There is no way of deciding the question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement – the truth of what is promised would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out[1]'. To put briefly where the fulfilment of the main purpose of the contract depends on the fulfilment of the stipulation the stipulation is a 'condition' and where it is not so the stipulation is only a warranty[2].

Instances

In *Meyer* v. *Kivisto*[3] there was sale of timber to be properly seasoned for shipment and in the event of dispute the buyer was not to reject the goods, but to accept or pay for them against shipping documents It was held that the provision as to seasoning was not a condition but only a warranty. In *Romariz* v. *Zeyen & Co.*.[4] refusal to pay was held justified as the dock warrants were not "clean." Where the promise goes only to part of the consideration breach of it may be compensated by damage[5].

When the subject matter of the contract is an existing specific chattel, a statement as to some quality possessed by or attaching to such chattel is generally taken to be a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from thing as described in the contract[6]. In *Behn* v *Burness*[7] there was sale of a specific thing with a description as to quality under such circumstances that the property passed by the sale. It was held that the buyer's remedy was by way of damage only.

Generally speaking there is no warranty with regard to defects which are known or apparent on a simple inspection[8].

In shipping contracts or charter parties statements that a vessel is to sail or be ready to receive cargo on or before a particular day, or statements as to the location of the vessel at the date of the contract have been held to be conditions, as in such contracts considering winds, markets and dependent contracts the time of a ship's arrival to load is an essential fact. *Glaholm* v. *Hays* (1841) 2 M & G. 257 : the ship to sail on or before a

1 Per Owen L J. in Bentsen v. Taylor Sons & Co. (1893) 2 Q. B. 274, 281, where the description of the ship as "now sailed or about to sail," was held to be of the substance of the contract.
See Wallis v. Pratt, (1911) A. C. 394.
(1930) 49 T. L. R 162.
(1910) 35 T. L. R. 299.
Greaves v. Legg (1854) 9 Ex. 709, 716.
Harrison v. Knowles (1917) 2 K. B. 606, 610 (affirmed in 1918 1 K. B. 608 on a different ground) where the statement as to the dead weight-capacity of a ship was held to be a warranty.
(1863) 3 B. & S. 751, 755. See Chanter v. Hopkins (1838) 4 M. & W. 399 as to the distinction between a sale of ascertained and unascertained goods.
Buttorfield v. Burroughs (1706) 1 Stlk. 211 ; Margetson v. Wright, 8 Bing. 455 (1832).

particular day. *Olliver* v. *Booker* (1847) I Exch. 416. "the ship now at sea, having sailed three weeks ago." *Behn* v. *Burness* (1863) 32 L J.Q.B. 204: the location of the ship at the date of the contract. *Compagnie Chemin-de fer etc Leeston* (1919) 36 T.L R. 68: now at liverpool; ready to-morrow. *Tarrabochia* v. *Hickie* (1856) I. H and N. 183. But see *Dimech* v *Cortell*, (1858) 12 Moo. P. C. 199 where there was knowledge and acquiescence on the part of the buyer as to the ship being in dry dock. But a statement that the ship shall sail with all convenient speed or within a reasonable time has been held to be a warranty

Representation distinguished from a condition or warranty.

A condition or warranty is to be distinguished from a representation. Chalmers[1] classifies representations made during a contract of sale of goods as of six kinds—

(1) Mere expression of *opinion*, or mere *commendation* by the seller of his wares (Gives no right of action)

(2) A warranty.

(3) A condition.

(4) False and fraudulent representation made anterior to contract (Gives right to damages, and frequently to rescission).

(5) Innocent misrepresentation (May give grounds for rescission, but no claim for damages).

(6) Representation creating an estoppel-therefore truth of which maker may not deny

A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it It may or may not be an *integral* part of the contract, and this is a question of construction of the terms of the contract, in words or in writing Where it is not an *integral* part of the contract, it effects it in the manner explained above. If it is an integral part of the contract, it may be either a condition or a warranty It must depend upon the intention of the parties whether an affirmation made at the time of, or during the negotiations for, the sale, is to be treated as a condition, a warranty or a mere representation and although an assertion made by the seller of a fact unknown to the purchaser may be strong evidence that it was intended as a warranty[2], it is not necessarily so in law[3] It must depend on the intention of the parties to be inferred from all the circumstances of the case, whether it be a condition or a warranty[4], and the mere fact that it is called a warranty will not necessarily prevent it from being a condition[5].

1 Sale of Goods Act, 11th Edn, p 42 see also notes at pages 94 to 101

2 De Lassalle v Guildford (1901) 2 K B 215, at p. 221, C. A.

3 Heilbut Symons & Co. v. Buckleton (1913) A. C. 30, per Lords Haldane and Moulton.

4 Behn v. Burness (1863) 3 B. & S. 751 124 R R. 794, Bentsen v Taylor (1893) 2 Q. B 274, at p 280, C. A Harrison v. Knowles & Foster (1917) 2 K. B. 606, at p 610; Brys & Gylson Ltd v. Imperial Steamship Co. (1918) 34 T. L R. 536.

5 Sub-section (4). Barnard v. Faber (1893) 1 Q. B. 340, C. A.

A warranty may be either included in the contract of sale[1], or may be given after the contract of sale is completed. Where a warranty is given after the contract of sale is completed it must be supported by fresh consideration.[2]

A representation of fact should be distinguished from a mere expression of opinion, belief or expectation. Thus, when a seller says that the goods are worth so much, he merely expresses an opinion. In *Lindsay* v. *Hard*[3], the statement as to value was meant to be acted upon and so was held to be representation.

A material misrepresentation, whether fraudulent or not, is sufficient to avoid the contract[4]. At common law innocent misrepresentation was not sufficient to avoid the contract and the tendency of the courts was to bring, if possible, any statement which is important enough to affect the consent of the party into the terms of the contract. In *Bannermann* v *White*[5], there was sale of hops by sample, the seller representing that sulphur had not been used in theit growth (use of which would make the goods unsaleable). Held, that the contract was conditional on sulpher not being used in the growth of the hops; and if sulphur had been so used, the buyer was at liberty to reject the hops, although they corresponded with sample by which they had been sold.

Section 13 of the Act gives the buyer an option to treat a breach of any condition to be fulfilled by the seller as a breach of warranty only or in other words, a seller's undertaking may be such that the buyer may waive it as a condition by accepting performance or otherwise, but may still have a remedy in damages for the failure in that particular undertaking.

It has been held under the English law that where an affirmation made at the time of sale amounts to a warranty and contract is reduced into writing, evidence of a contemporaneous oral warranty would not be admissible[6].

Express and implied conditions.

Conditions may be *express* or *implied*. An express condition is one stated definitely in so many words. Implied conditions are those which the law incorporates into contract unless parties agree to the contrary.

Express and implied warranties.

Warranties, like conditions, are—

1 Hopkins v. Tanqueray (1854) 15 C. B. 130 (horse); cf. Bannerman v. White (1861), 10 C. B. N. S. 844 (hops sold by sample); Stucley v. Baily (1862), 1 H. & C. 405 (yacht).

2 Roscorla v. Thomas (1842), 3 Q. B. 234, 61 R. R. 216; Lysney v. Selby (1705) 2 Lord Raymond 1118, per Holt C. J.

3 (1874) L. R. 5 P. C. 239. See also Power v. Barham (1830) 4 A. & E. 473 (sale of pictures).

4 See S. 19, Indian Contract Act, 1872. See also Harrison v. Knowles (1918) 1 K. B. 608; Abram etc. Co. v. Westville Shipping Co (1923) A. C. 773.

5 (1861) 31 L. J. C. P. 28.

6 Harnor v. Groves (1855), 15 C. R. 667; aliter if the writing be a mere memorandum of the contract; Allen v. Pink (1838), 4 M. & W. 140 (horse).

(1) Express if entered into contract ; or

(2) Implied if attaching to contract by operation of law or custom.

With respect to goods sold, warranties have been classified into two classes, namely,

(i) Those relative to the title in the goods, and

(ii) Those relative to the quality of goods.

Implied conditions and warranties are enforced on the grounds that the law infers from all the circumstances of the case that the parties intended to add such a stipulation to their contract, but did not put it into express words[1]. These are dealt with in sections 14 to 17.

The existence of an implied condition or warranty may be rebutted by proof of facts which show a contrary intention

13. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

When condition to be treated as warranty

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Analogous law.

This section corresponds to section 11 of the English Act, sub-sections (1), (2) and (3), being respectively the same as sub-section (1), clauses (a) and (c) and sub-section (3) of the said Act, with only certain verbal changes here and there. Sub-section (1), clause (b), of section 11, is already included in sub-section (4) of section 12, and sub-section (2), which is applicable only to Scotland, has been omitted. The provisions of sections 117 and 118 of the Indian Contract Act, since repealed, have been represented by the first two sub-sections of this section—See Appendix A and Appendix B.

1 See The Moorcock (1889) 14 P. D. 64, at p. 68, Bowen L. J.

Waiver of condition or to treat it as warranty.

Section 13 gives four cases in which a condition may be waived or treated as warranty, two of which given in sub-section (1) are voluntary, depending on the volition of the buyer, namely :—(1) Where he waives the condition, or (2) elects to treat the breach of it as a breach of warranty. The other two given in sub-section (2), do not depend on the will of the buyer but create an estoppel against him by his conduct and wherein waiver is comprehensively presumed by law. They arise : (1) When the contract being unseverable the buyer has accepted the goods or part thereof, or (2) the sale being a sale of specific goods the property in them has passed to the buyer. In such cases he can claim compensation for the loss suffered by him by breach of the condition in respect of the goods accepted by him as he would have a right to in the case of a breach of warranty and can at the same time treat the contract for the undelivered part as repudiated.[1] Where the sale relates to specific goods and the property in them has passed to the buyer the buyer is not entitled on the breach of a condition to treat the contract as repudiated but can only claim compensation as in the case of a breach of warranty.[2] Parties may, however, contract themselves out of this rule by including a stipulation to that effect in their contract either expressly or by necessary implication in which case the terms of the contract must be strictly adhered to and will not be affected by any provision of sub-section (2) of the section[3]. Sub-section (3) provides that the provisions of this section do not apply to any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Voluntary waiver of a condition—sub-section (1).

As is clear from the previous section, the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other party to comply with his promise. Thus the failure of the seller to fulfil a condition to be performed by him entitles the buyer to treat the contract as repudiated and to refuse to accept the goods, and, if he has already paid for them, to recover the price. Even if the goods have been delivered to him, he has the right to reject them if on examination he finds they are not according to contract for he has got the right to examine them[4], and can repudiate the contract.

Sub-section (1) is based on the general principle of the law of contract that a party may waive a stipulation which is for his own benefit[5], according to the maxim *Cuilibit licet renunciare juri pro se introducto*[6]. This is known as a voluntary waiver. Where, however, a stipulation operates for the benefit of both parties it cannot be waived by one party without the consent of the other but only by mutual consent.[7]

1 See Jackson v. Rotax Motor & Cycle Co., (1910) 2 K. B. 937.
2 Graves v. Legg, 9 Exch. 709 (717); Behn v. Burness, 32 L. J. Q. B. 204; Wallis v. Pratt, (1911) A. C. 394.
3 Bannerman v. White, 31 L. J. C. P. 28; Head v. Tattersall, L. R. 7 Exch. 7.
4 Section 41, and compare section 17 (2).

See Hartley v. Hymans (1920) 3 K. B. 475 ; In re Moore and Landauer (1921) 26 Com. Cas 267, at p. 276, C. A.; see Panoutsos v. Raymond (1917) 2 K. B 473, C. A.
Chalmers, p. 45
Maine Sp. Co. v. Sutcliffe & Co., (1917) 23 Com. Cas 216 (219).

The words "impossibility or otherwise" in sub-section (3) are wide enough to cover the three cases of implied waiver of conditions, viz, hindrance by the promisor of performance of conditions, and his own refusal to perform his promise, or his disabling himself. If a conditiou be waived temporarily, notice should be given before its fulfilment is again insisted on[1]. Where the fulfilment of a condition by one party is prevented by the other the condition is waived[2]; and the wrongful repudiation of a contract by one party may operate as a waiver of conditions precedent to be performed by the other[3]. Similarly, a party may incapacitate itself from carrying out conditions and the result would be the same[4].

But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal refusal to perform the promise, and must be treated and acted upon as such by the other party.[5]

What amounts to waiver

Waiver may be express or it may implied from the acts and conduct of the promisee,[6] or it may arise by implication of law.[7] The promisee must, on discovering the breach of a condition precedent, exercise his right to avoid or to affirm the contract.[8] If the promisee after breach of a condition precedent agrees to proceed with the contract the condition is waived.[9] If he even induces the promisor to a reasonable belief that he is still bound by the contract,[10] or that the strict fulfilment of the condition will not be insisted upon[11] or continues to treat the contract as subsisting, or allows the promisor to go on with the performance of subsequent stipulations,[12] he has thereby waived the right and estopped himself from setting up the unperformed condition as an answer to the claim of the other party to the contract,[13] in as much as waiver may be evinced by any conduct inconsistent with the continuance of the right waived.[14] Where a promisee having the right to insist on performance of a condition precedent before performance of his part of the contract, chooses to go on performing his part of the contract without insisting on the performance of the condition precedent before that, he waives the right to the performance of such condition and cannot subsequently rescind the contract for its non-fulfilment[15]. So also where on a dispute, that the goods

1 Panoutsos v. Raymond Hadley Corporation. (1917) 2 K. B. 473, C. A Bentsen v. Taylor, (1893) 2 Q. B. 274. at p. 283 C. A.

2 Mackay v. Dick (1881), 6 App. Cas. 251 (digging machine. condition to be fulfilled by seller prevented by buyer), followed Kleinert v. Abosso Mining Co. (1913), 58 S. J. 48, P. C. (defective crusher supplied.

3 Cort v. Ambergate Railway Co. (1851), 17 Q. B. 127 (Chairs); Braithwaite v. Foreign Hardwood Co.. (1905) 2 K. B. 543, C. A.

4 Inchbald v. Western Neilgherry Coffee Co. (1864) 17 C. B. N. S. 733, 142 R. R. 603.

5 See Benjamin on Sale, 7th Edn., page 587.

6 E. G. Dupont v. British S. African Co. 18 T. L. R. 24.

7 E. G. Measures v. Measures, (1914) 2 Ch. D. 248.

8 United Shoe Machinery Co. v. Brunet. (1909) A. C. 339, P. C. Workman v Lloyd (1908), 1 K. B. 968.

9 See S. 39, Indian Contract Act. Alexander v. Gardner 1 Bing N C 671 ; Wing v. Harney, 23 L. J. Ch. 5[illegible]

10 Workman v. Lloyd, (1908) 1 K. B 968 ; Bentsen v. Taylor, (1893) 2 Q. B. 274 C. A.

11 Reuter v. Sala, 4 C. P. D. 243 (24

12 Roberts v. Brett. 11 H. L. Cas., p. 35

13 Shyama v. Heras, 26 Cal. 160.

14 Remfry, p. 518, Cooverjee Bhoge R. N. Mookerjee, 36 Cal. 617.

15 Sooltan Chand v. Schiller, 4 Cal. 252

delivered were not of the contract quality, that matter is submitted to an arbitrator who gives an allowance on the examination of samples, it is not open to the buyer to sue for damages for breach of the warranty of quality, unless he can show that the samples sent to the arbitrator were fraudulent.[1]

Besides the provisions contained in sub-section (3) of section 13 of the Act, waiver of a condition precedent may also be implied by law in the following cases :—

(1) Where promisee prevents or hinders performance of it;[2]

(2) When the promisor incapacitates himself from performing;[3]

(3) Where either party to the contract repudiates it ;[4]

(4) Where the promisee accepts the benefit of part performance,[5] as where he accepts the whole or part of the goods;[6]

(5) Where the buyer incapacitates himself from returning the goods.[7]

Prevention or hindrance by promisee

Where one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented and he is entitled to compensation [8]

Similarly the promisor is excused where performance is rendered impossible by the promisee and the law implies a waiver.[9]

Such impossibility must, however, relate to some substantial or essential part of the contract [10] The rule is not confined to case of direct and forcible prevention but extends even to default or neglect in doing or providing anything which a party ought to do or provide and without which the other party cannot perform the condition[11]. as where the promisee so acts that the contract cannot be performed in time[12], or as to expose the promisor to a civil suit if he carried out the contract[13] But the promisee must be the *causa causans* and not the *causa sine qua non*[14] and the promisor must prove that he was prevented or hindered by the act of the promisee or his agents.[15] The case of a third party preventing performance,

Fornara v Ramnarain, 14 Beng L R 180

Narain v Mahendra, 15 Cal L J 322

Section 57 of the Indian Contract Act provides that unless reasonable facilities for performance are afforded, the promisor is excused by such neglect or refusal as to any non-performance caused thereby

Subba Rao v Devur, 18 Mad. 126 See also Ss 34 and 39 of the Indian Contract Act

S 39 Indian Contract Act Gueret v Audony, 62 L J Q B 633

Dimeck v Corlett, 12 Moo P. C 199 ; Ellen v Topp, 6 Ex 424; Behn v Burness 32 L J Q B. 204 (205), Wallis v Pratt, (1910) 2 K B 1003

C. A. Jackson v Rotax Co, 80 L J Q B 88

S. 13 (2) supra.

7 Remfry p 521

8 As to what amounts to prevention see Lodder v Slowley, (1904) A C 442 P C

9 O' Neil v Armstrong, (1895) 2 Q B. 418 ; Planche v Bolburn, 8 Bing. 14

10 Panama Tele Co. v India Rubber Co., L R. 10 Ch p. 532.

11 S 67, Indian Contract Act ; Giles v. Edwards, 7 T R. 181 ; Roberts v. Bury Commissioners, L. R 5 C. P 310; Holme v Guppy, 3 M. & W. 387.

12 Roberts v Bury Commissioners, supra

13 European Royal Mail v. Royal Mail, 30 L. J. C. P. 247.

14 Alston v. Herring, 11 Exch. 822, Lodder v. Slowley, (1904) A C. 442 P C

15 Budgett v Binnington, (1891) 1 Q. B. 35 ; O Neil v Armstrong (1895) 2 Q B 70, 418.

however, falls under section 56 of the Indian Contract Act,[1] and renders the contract void unless the promisor could foresee and prevent the third party from doing so. If the promisee refuses to accept the stipulated benefit which the promisee is ready and willing to give, his refusal as already noted, would amount to waiver and the promisee may be charged with his promise as absolute of the fact that the promisor on account of refusal has not preformed his part of the contract.[2]

Incapacitation of promisor

If a person sell specific goods to be delivered on the request of the buyer and afterwards sells and delivers the same goods to another, he dispenses with the request of the former buyer for delivery as a condition precedent to delivery.[3] So, where a party makes it impossible for himself by his own acts or conduct, to complete his contract, it amounts to repudiation of the contract and a waiver of conditions precedent[4]. Although mere inability to perform a condition prior to the day fixed for its performance is no ground for repudiation of the contract unless it is warranted by some express agreement or custom,[5] yet the promisee is not always bound to wait until the due date and, if he can show by sufficient evidence that the condition cannot be practically fulfilled by the due date or that the promisor has substantially admitted that the condition is incapable of fulfilment the law will imply a waiver and will allow him to treat the contract as repudiated notwithstanding the fact that the time for the performance of the condition precedent has not yet arrived.[6] So where the promisor incapacitates himself before the time of performance the promisee may treat it as an immediate breach and sue at once without waiting for the due date.[7]

Repudiation of contract

Where the contract itself is repudiated by either party before the performance of a condition becomes due there being no contract subsisting the condition is deemed to be waived,[8] provided such repudiation is communicated to the other party,[9] and the latter accepts it and acts upon it as such[10] otherwise it is a mere nullity.[11] There is no such case, where the contract is repudiated and repudiation accepted by the other party, to tender the goods.[12]

But unless and until the repudiation is accepted by the other party the contract remains subsisting notwithstanding such repudiation[13] and the party making the repudiation may retract or

1 Volkart v. Nusservanji, 18 Bom. 892.
2 Bradley v. Benjamin, 46 L J. Q. B. 590; Gibs v. Gibs, 9 Q. B. 164; Stewart v. Rogerson, L. R. 6 C. P. 424 (where promisee was held liable for full freight for refusing to name place for delivery). Strictly speaking these cases also fall under express waiver and waiver by conduct.
3 Bowdell v. Parsons, 10 East. 395; Hotham v. East India Co., 1 T. R. 638; Forrest v. Aramayo, 83 L. T, 335 C. A.
4 Ford v. Tiley, 6 B. & C. 325; Lovelock v. Franklyn, 8 Q. B. 371.
5 Smith v. Butler, (1900) 1 Q. B. 694.
6 Ibid Remfry, p. 529.
7 Synge v. Synge (1894) 1 Q. B. 466 C.A. Frost v. Knight, L. R. 5 Ex. 322.
8 R. Y. R. M. C. Chattiar v. S. S. Pather, 19 Mad. L. J. 98.
9 Ibid.
10 Ibid.
11 Mansukhdas v. Rangayya, 7 Mad. H. C. 662; Gorret v. Inomy, 62 L. J. Q. B. 633.
12 Wertheim v. Chicoutimi, (1910) 16 Com. cas. 297 P. C. (1911) A. C. 301; Boyts Craig & Co. v. Otto Martin, 16 Bom. 369 P. C.
13 Mackertick v. Nobo Coomer, 30 Cal. 477.

withdraw it[1] and avail himself of any intervening circumstances as a justification of his action[2] or as a defence either wholly or in part against the other party's claim[3]. Repudiation may be express or it may be inferred from the facts of the case[4]. Repudiation by one of several joint promisors is sufficient to justify avoidance of the contract in as much as the promisee has a right to call upon any of them to perform the contract and such repudiation injuriously affects that right.[5]

Incapacitation of the promisee

If the buyer so deals with the goods accepted by him as to render it impossible to return them to seller a waiver will be implied even if the goods did not answer the description and even if he had stipulated for such return, in as much as he cannot put the seller in the position in which he would have been if the goods were returned without dealing with them, he is estopped from denying that he accepted the goods in full performance of the contract.[6] The buyer's right to reject the goods depends on his power to restore the seller to his original condition.[7] But if the change has been caused by the legitimate exercise of rights given by the contract as for example by testing the goods in a reasonable manner[8] or by an act of God without any fault of the buyer[9] it will not preclude the buyer from exercising his right of rejection.

Acceptance

Acceptance of goods may also imply waiver of condition precedent in the absence of a stipulation inconsistent with such implication as where the parties stipulate that goods may be returned even after what would otherwise amount to acceptance[10] The acceptance of anything tendered under the contract is a bar to a suit for nondelivery, even though it is made without knowledge of a breach of condition.[11] Similarly, under a C. I. F. contract the acceptance of a policy was held a waiver of its form.[12] Where, however goods are accepted conditionally by arrangement, the acceptance may be withdrawn and the goods returned on failure of the condition [13]

See also notes under sub-section (2) infra

It is well established in English law that although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part[14] of that which was to be performed in his favour, the

1 Coit v. Ambergate Railway Co, 17 Q. B. 127 ; Ss. 6 and 66, Indian Contract Act.
2 Frost v. Knight, supra ; Braithwaite v. Foreign Hardwood Co, (1905), 2 K. B. 543.
3 Remfry, p. 527.
4 Remfry, p. 535.
5 R. Y. R. M. C. Chattiar v S. S. Pather, 19 Mad. L. J. 28.
6 See Ss. 36 and 38, Specific Relief Act ; and Ss. 39 and 64, Indian Contract Act ; Subba Rao v. Davar Shetti, 18 [illegible] 198
[illegible] v. Tattersall, (1871) L. R. 7 Ex. 7 ; Urquhart v. Macpherson, 3 Ap. Cas. 831 P. C.
Ibid ; Remfry, p. 545.
Couston v. Chapman, L. R. 2 H. L., p. 254 ; Lamond v. Davall, 9 Q. B, 1030. Wallis v. Pratt, (1911) A. C. 394.
Dupont v. British South African Co., 18 T. L. R. 24.
Lucy v. Mouflet 29 L. J. Ex. 110, Heilbutt v. Hickson, L. R. 7 C. P. 438; Couston v. Chapman, supra.
14 See Wallis v. Pratt, (1911) A. C. 394 ; Ellen v. Topp (1851), 6 Ex. 424 ; 86 R. R. 353 ; Behn v. Burness (1863), 3 B & S. 751 ; Mondel v. Steel (1841) 8 M. & W. 858, 58 R. R. 890.

condition precedent must be treated as if it had become a warranty, or independent agreement, affording no defence to an action but giving right to a cross action or counterclaim for damages[1]. But in that case the buyer remains liable to the seller for the price.

Compulsory treatment of a breach of condition as breach of warranty—sub-section (2).

Sub-section (2) relates to two specific cases, *viz.*, (1) where a contract of sale is not severable and the buyer has *accepted* the goods wholly or partly, and (2) where the contract relates to specific goods and the property in them has passed to the buyer. This sub-section it based on the principle that once the buyer has accepted the goods he cannot reject them on any ground, but can only maintain an action for damages, as if the conditions were only a warranty[2]. Where, however, the contract is severable the buyer is not precluded from exercising his right of rejection, if a condition is broken, by a mere acceptance of a part of the goods.

Thus in a contract by instalments or a contract which according to its terms is treated as an instalment-contract, the buyer can reject the quantity under any instalment. But under an indivisible contract, the buyer loses his right to reject if he accepts part[3].

In *Jackson V. Rotax Motor and Cycle Co.*,[4] an English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions and prices 'delivery as required' and the horns being delivered in several instalments the buyer accepted some instalments but rejected the others on the ground that the goods were not of a merchantable quality. It was held that the buyer was not precluded from doing so and the goods being unmerchantable he was quite justified in doing so.

In *Wallis* v. *Pratt*,[5] the sale was by sample of a quantity of seed described as "common English sainfoin". The sellers delivered giant sainfoin, a different kind of seed, the difference not being discoverable except by sowing, and the defect also existing in the sample. The contract of sale contained a clause that "the seller gave no *warranty* express or implied as to growth, description, or any other matters." The buyers resold the seed to a sub-buyer, who sowed it, and produced a crop of giant sainfoin, and entirely different article. *Held* that the clause did not protect the sellers. They had excluded their liability for breach of *warranty* only, and a warranty and a condition were *ab initio* entirely different things although, in an action for the breach (as in the case in question),

1 See Benjamin on Sale, 7th Edn., p. 563.

2 Wallis v. Pratt (1910) 2 K. B. 1013, at p. 1015, C. A.; Graves v. Legg (1854) 9 Exch. 709; 96 R. R. 991; Nagardas v. [illegible] (1930) 32 Bom. L. R. [illegible].

3 [illegible] Co., A. I. R. 1932 Cal. 879 = 59 Cal. 928 = 140 I. C. 877 Rotax v. Horn. (1910) 2 K. B. 937 followed.

4 (1910) 2 K. B. 937. See also Simpson v. Crippin, L. R. 8 Q. B. 14; Brandt v. Lawrence, 1 Q. B. D. 344.

5 (1911) A. C. 394; 80 L. J. K. B. 1058.

condition might be treated for remedial pursoses *as* if it had become a warranty.

In *Hardy* v *Hillerns*[1] the contract was for the sale of wheat on c.i.f. terms. The buyers took up the documents and resold and delivered part of the wheat to sub-buyers without making a proper examination of the wheat. Later, having found, as the result of further examination, that wheat was of inferior quality, they claimed to reject. *Held*, that the resale and delivery of part of the wheat was an act "inconsistent with the ownership of the seller", and thereby the right of rejection was lost.

Unless there is something in the contract to the contrary, a buyer cannot be compelled to take non-specific goods with an allowance for inferiority in quality. But the right to reject the goods as being of an inferior quality is not exercised by the purchaser when the goods are tendered, but a right of a proprietary character in respect of the goods is exercised by directing delivery to be made to third parties when the buyer accepts the goods.[2]

Similarly, buyer may accept the goods because the examination has not revealed some latent defect or has failed to show that they are not of the stipulated description[3]. In all such cases the buyer is in the same position as if he had voluntarily and intentionally waived the performance of the condition, and can only rely upon his right to claim damages from the seller.

In the case of *Shoshi Mohan v. Nobo Kristo*[4], it was observed that the buyer to whom the property in goods had been transferred and part-delivery had been made could only avoid the sale if he could show fraud or misrepresentation.[5]

Section 13 (2) of the Act has been framed with an eye to the special case of "bargain and sale"; and its operation is limited to genuine cases of "bargain and sale" according to the Common Law of England as distinguished from cases of goods "sold and delivered". In the case of a transaction giving rise to a claim an account of goods "sold and delivered," where the sale is a sale of specific goods by sample. the buyer in the event of the goods being inferior to sample, has not only a right to damages, but also a right to reject the goods[6].

What amounts to "acceptance" within the meaning of this section is stated in sections 41 and 42 *post*. As to when the property in goods passes from the seller to the buyer see sections 19 to 24 *post*. In order that the buyer's conduct should have the effect stated in this sub-section, it must amount to an acceptance, as distinguished from a mere receipt of the goods. For example, there is no acceptance by

1 (1923) 2 K. B. 490.

2 Haridas v. Kalumull (1903) 30 Cal 649; see also Ruttonsi Rowji v. The Bombay United Spinning & Weaving Co., Ltd., (1917) 41 Bom. 518, 539 540.

3 Nagirdas v. Velmahomed=A. I. R 1930 Bom. 249=126 I. C. 312 and Jatindra Chandra Banerjce v. Muri Dhur, A. I. R. 1926 Cal. 749=94 I. C. 373.

4 (1879) 4 Cal. 801, 806.

5 See also Heilbutt v. Hickson, (1872), L. R. 7 C. P. 431 at p. 449, 450.

6 Lal Chand Deep Chand v. Baij Nath Jugal Kishore, A. I. R. 1927 Cal. 140.

merely retaining part of the goods delivered by instalments where each instalment is not to be separately paid for[1].

Where the buyer has not accepted a part of the benefit of the execution of the contract in his favour, or has not waived the performance of the condition, the condition must in the case of a contract for unascertained goods, be complied with by the seller, and the buyer cannot be called upon to accept the goods with an allowance for a partial failure to perform it. Thus, where the goods actually delivered are not of the quality stipulated for in the contract, it cannot be shown that a custom of the trade requires the buyer to accept the goods with an allowance for inferior quality, such a custom being inconsistent with the express terms of the contract.[2]

"Treated as a breach of warranty"

It is to be noted that the words, treated as a breach of warranty' do not mean become warranty "*ex post facto*"; but that the remedy of the buyer after an acceptance of the goods, whether voluntary or compulsory, is a suit for damages as if the condition were a warranty[3]. This section does not lay down that the condition becomes a warranty if the goods are accepted but only that the legal remedies for the breach of a condition become limited to the single remedy which exists in the case of the breach of warranty namely, a suit for damages. Hence a term in the contract expressly excluding warranty does not affect the buyer's right to recover damages for the breach of a condition[4] Whether an obligation is a condition or a warranty is decided by the contract itself and not by matters subsequent thereto.'

Divisible promises : what degree of failure of performance discharges the contract ?

A case may arise in which it is alleged by one party to a contract that he is discharged from the performance of his part by the fact that the other party has failed to do so, either wholy or to such an extent as to defeat the objects for which the contract was made.

No argument is needed to hold that a total failure by A to do that which was the entire consideration for the promise of X, fell due, will exonerate X. But it may be that A has done something, though not all that he promised; or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by instalments. In these cases the question arises, has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed.

The best illustrations of divisible promises are to be found in contracts to receive and pay for goods by instalments. Where there are numerous, and extend over a long time, a default either of deli-

1 See Waddington v. Oliver (1805), 2 B. & P. N. R. 61 ; 9 R. R. 614 and notes under section 38.

2 Ruttonsi Bowji v. Bombay United Spinning & Weaving Co., Ltd., (1916) 41 Bom. 518, 538—540=37 I. C. 271.

3 Per Fletcher Moulton L. J. in Wallis v. Pratt, (1910) K. B. 1003 (1015).

4 Wallis v. Pratt, (1911) A. C. 394.

5 Ibid; Baldry v. Marshell (1925) 1 K. B. 260, C. A.

very or payment does not necessarily discharge the contract, though it must of course in every case give rise to an action for damages[1].

The subject will be found dealt with fully under section 38 of the Act.

. Sale of specific goods.

The case is more difficult where the contract is for specific goods, the property in which has passed to the buyer. Where specific goods are sold, that is to say, 'goods identified and agreed upon at the time the contract of sale is made,' the contract operates as a conveyance and the property may and often does pass before delivery and acceptance.[2] Where the property in the goods has passed to the buyer he is not *discharged* though the goods turn out to be worthless; he must keep the goods, but he may bring an action for money paid under the contract in so far as it is in excess of the value of the goods, and for any further damage occasioned by the breach of warranty.[3] It was observed in *Behn Burness*[4]: "If a specific thing has been sold, with a warranty of its quality, *under such circumstances that the property passes by the sale*, the vendee, having been thus benefitted by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract[5]), but must have recourse to an action for damages in respect of the breach of warranty But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed."

Speaking of a clause in a contract that goods should be similar to sample, Blackburn J remarked : "Generally speaking, when the contract is as to any (*i. e.*, unascertained) goods, such a clause is a condition going to the essence of the contract: but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages[6]".

Of course, the purchaser can avoid the contract if there is an express condition in the contract or on ground of fraud[7].

As has already been referred to above, this clause corresponds to clause (c) of section 11 of the English Act. Pointing out the difficulties in the construction of this clause, Benjamin observes :

"Some difficulty arises in the interpretation of this clause, so far as it deals with 'specific goods' the property in which has passed to the buyer." If there be an

1 See Anson's Law of Contract, Part V, Chapter XV ; 16th Edition, p. 358.
2 See section 20 of the Act.
3 Street v. Blay, 2 B. & A. 456, 36 R. R. 626.
4 (1863), 3 B. & S. 751, at 755—756.
5 Bannerman v. White (1861), 10 C. B. (N. S.) 844 ; 31 L. J. C. P. 28 ; 128 R. R. 953.
6 Heyworth v. Hutchinson (1867) L. R. 2 Q. B. 447, 451.
7 See Heilbutt v Hickson (1872) L. R. 7 C. P. 438, at p. 449 ; Behn v. Burness cited above.

unfulfilled condition in the proper sense, the property can never pass to the buyer by the contract, though it may pass by the buyer's subsequent acceptance. By the common law the existence in the contract of a 'warranty', that is to say, a stipulation as to some quality or incident of the goods, not forming part of their description and consequently not a condition, but collateral to the main purpose of the contract, did not prevent the property passing, if otherwise it would pass; and when it passed, the buyer, having been benefited by becoming the owner of the goods, could not afterwards reject them for breach of warranty, and repudiate the contract, unless there was an express agreement to that effect. Accordingly, a contract of sale of specific goods was ordinarily a bargain and sale. But clause (c), though evidently intended to exact this law, uses the word 'condition'. The case, it would seem, contemplated by the clause, is one where the property passes by the buyer's *subsequent* acceptance of the goods by a waiver of the right of rejection. But the logical arrangement of section 11 is thereby destroyed, for the suggested waiver is a voluntary one—a case already dealt with by clause (a)—whereas clause (c) deals only with compulsory waiver[1]".

"Unless there is a term of the contract express or implied to that effect."

The parties are free to make any contract and they can contract that none of the facts and circumstances stated above will preclude a party from treating the contract as rescinded or repudiated if a particular condition of the contract is not complied with.[2] If they so agree none of the facts and circumstances dealt with above as amounting to waiver of a condition will be taken in that light as waiver is but a sort of estoppel and if the other party knew that a particular result will follow a particular act according to the terms of the contract he cannot claim the benefit of estoppel which is given only to the unwary and is based more or less in a change of position due to some wrong belief[3].

Impossibility of performance—sub-section (3).

Sub-section (3) lays down that nothing in section 13 of the Act shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise. Thus, in a contract for the sale of specific goods the goods may have perished before the contract was made, or they may have perished after it was made, but before the risk passed to the buyer. In both cases the performance of the contract has become impossible, and the agreement is, therefore, void[4]. The fulfilment of conditions or warranties under such contracts is excused[5].

The uniform rule that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply which his promise, applies although non-performance is caused by the condition being at the time of the contract, or (except where it is by the fault of the promisor) subsequently becoming impossible of performance[6]. Thus the buyer cannot be called upon to perform his promise, if a condition to be performed by the seller is not fulfilled by reasoning of its having, at the time of the contract or subsequently, become impossible of performance and he is released from liability. The

1 Benjamin on Sale, 7th Edn., p. 588.
2 See Bannerman v White, 10 C. B. N. S. 844; Head v. Tattersall, L. R. 7 Ex. 7.
3 Ibid.
4 See sections 7 and 8 ante.
5 See Chapman v. Withers (1888) 20 Q. B. D. 824.
6 See Benjamin on Sale, 7th Edn., p. 584.

seller may rely upon the impossibility as an excuse to himself, if sued by the buyer. But the buyer is not so released if the non-performance is due to his fault. In such cases the buyer must be deemed to have waived the condition and therefore is in the same position as if it had been fulfilled[1].

"Impossibility" includes what is known as "legal impossibility[2]". A declaration of war may by an Act of Legislature prohibit all intercourse with the enemy so that performance of a contract made before war becomes impossible[3].

See also notes under section 8 supra.

Implied undertaking as to title, etc.

14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is--

(a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass ;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Analogous law.

This section is a reproduction of S. 12 of the English Act. Prior to the passing of this Act, section 109 of the Indian Contract, Act implied that a stipulation regarding title was merely a warranty and breach of it entitled the buyer, as well as person claiming under him, to recover the loss sustained by him from the seller. It was a departure from the English law. Before 1893 the English law on the point was in an unsettled state. There was considerable uncertainty as to the nature of the seller's liability for defective title, and a distinction was drawn between sale and an agreement to sell. The rule of *Caveat emptor* was often applied in cases of defective quality as well as defective title. Again in the case of sale of a specific chattel it was held that there was no implied warranty (used in the sense of a condition) of title, and if there was no fraud the seller was not liable for a bad title, unless there was a warranty express or implied[4]. S. 12 (1) settled the law in England regarding implied condition as to title and the older authorities should be considered in the light of that section. In every contract of sale

1 See Sections 53 and 56 of the Indian Contract Act, 1872.

2 See United States v. Pelly (1899) 15 T. L. R. 166 (state of war).

3 See Exposito v. Bowden (1857), 7 E. & B. 763, at p. 781, Ex. Ch. and notes on pages 142 and 143.

4 See Morley v. Attenborough (1849), 3 Ex. 500 ; Chapman v. Speller (1850), 14 Q. B. 621.

law now presumes an implied undertaking on the part of the seller ; (1) that he has title or ability to sell ; (2) that he can put the buyer in quiet possession or enjoyment of the thing sold ; and (3) that his such possession or enjoyment will not be disturbed by any third person by virtue of a charge or encumbrance on the thing sold.

Implied condition as to right to sell—clause (a).

Clause (*a*) of the present section lays down that in a contract of sale, ***unless the circumstances of the contract are such as to show a different*** intention, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. As a result of it, if the title turns out to be defective, the buyer is entitle to reject the goods, subject, of course, to the provisions of section 13 *ante*. Section 109 of the Indian Contract Act treated a stipulation regarding title as a "warranty" only the breach of which gave a right to the buyer to claim damages from the seller. Inasmuch as it is an essential element of the contract of sale that there should be transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the goods the seller undertakes to transfer the ***property*** in the thing, and thus warrants his title or ability to sell.

Wherever a man sells goods *as owner*, he impliedly undertakes that the goods are his own goods, and that he has a right to make the sale he professes to make . and, if he was not the owner at the time of the sale, and was not selling his own goods but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking[1]. It was held that there was an "implied warranty of title" if the seller affirmed the goods to be his own, and he was deemed to make that affirmation when goods were sold at a shop or warehouse where the seller usually dealt with such goods[2].

Formerly the rule in England was stated to be that on a sale of specific goods there was no implied warranty of title, and that, in the absence of fraud, the seller was "not liable for a bad title unless there was an express warranty, or an equivalent to it by declaration or conduct[3]". But as Lord Campbell said, in 1851, "the exceptions have well-nigh eaten up the rule[4]" and clause (*a*) (corresponding to sub-section (1) of the English Act) may be regarded as declaratory.

"Unless the circumstances of the contract are such as to show a different intention."

1 Eichholz v. Bannister, 17 C. B. N. S. 708 ; 34 L. J. C. P. 105.

2 See Sims v. Marryat (1851) 17 Q. B. 281, 85 R. R. 462 ; Eichholz v. Bannister supra.

3 Morley v. Attenborough (1849), 3 Exch. 500 at p. 512 (auction sale of forfeited pledges); See also Williamson v. Albion (1802) 2 East 446, 448 ; Ormrod v Hutch (1845) M. & W. 651, 664, Exch.

4 Sims v. Marryat (1851), 17 Q. B. 281, at p. 291 (sale of copyright).

The circumstances of the contract may, however, rebut the implied condition of title on the part of the seller. Whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has noticed thereof, he is bound to look into the title of his vendor; for there is not under such circumstances, any implied condition of title on the part of the vendor[1]. The latter merely undertakes and promises that he does not, at the time he sells. know of any defect in his authority or title to sell; and he cannot be made responsible for the repayment of the purchase-money. unless it can be proved that he knew he had no right or title to sell, and that consequently his conduct was fraudulent. Thus in the case of sales by sheriffs of goods taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority, or that he has no right or title to sell[2]. So, in the case of sale by pawnbrokers of unredeemed pledges, the pawnbroker only warrants the subject matter of the sale to be a pledge the time for the redemption of which has expired. He does not warrant or promise that the pledgor had a title to pledge the article; nor does he impliedly warrant the purchaser against eviction[3].

Where a bank presents a bill of exchange with bills of lading annexed, it is not taken to guarantee that the bills of lading are genuine[4]. So in a sale of a patent, the seller is not presumed to warrant that the patent is free from intrinsic defects which might make it voidable or defeasible[5], or that it is void[6], but only that he is the owner of the patent[7].

The Indian authorities have followed the English rule[8], although an express assertion that the goods are the property of the execution debtor will amount to a warranty to the buyer to the extent, at all events, of the purchase money in the hands of the sheriff or execution creditor[9].

There may also be an understanding in fact between the parties that the seller is dealing only with such interest as he may have: in that case the implied condition is on general principles excluded[10].

Meaning of "right to sell"

The expression "a right to sell" bears its natural meaning; it is not limited to a right to pass the property, and accordingly a sale which would be a breach of patent, copyright, or trade mark right may be repudiated by the buyer. The title which the seller must have is the complete right of disposal, and this will be

1 Baqueloy v. Hawley, L. R. 2 C. P. 625; 36 L J. C. P. 328.
Chapman v Speller, 14 Q. B. 621; 19 L. J. Q. B. 239; Ex-parte Villars (1874) L. R. 9 Ch. App. 432, 437; Peto v. Blaydes (1814), 5 Taunt 675; cf. Dorab Ally Khan v. Abdool Aziz (1878), L. R. 5, Ind. App. 116. Sale by a ship-master Smith v. Neale, 26 L. J. C. P. 143.
Morley v. Attenborough, 3 Exch. 500; 18 L. J. Ex. 148.

4 Leatham v. Simpson, L. R. 11 Eq. 398; Baxter v. Chapman, 29 L. T. 642.
5 Hall v. Condor, 2 C. B. N. S. 22.
6 Smith v. Neale, 2 C. B. N. S. 67.
7 Remfry, p. 591.
8 Dorab Ally Khan v. Executors of Khajah Meheordin (1878) 3 Cal. 806 813 L. R.
9 Framji v. Harmasji (1877) 2 Bom. 258.
10 Baqualey v. Hawley (1867) L. R. 2 C. P. 625—bargain at auction—purchase of—no warranty.

incomplete if he can be stopped by process of law from selling. In *Niblett* v. *Confectioners' Materials Co.*,[1] the defendants sold to the plaintiffs condensed milk in tins c. i. f. from New York to London. Some of the goods arrived bearing a brand infringing the trade mark of third persons, at whose instance the commissioners of customs detained the goods. To get possession of the goods the buyers had to remove the brand. Having sold at a loss they claimed damages for breach of warranty. *Held*, by the Court of Appeal, that the defendants had broken the implied condition of section 12 (1) of the Act (English, corresponding to section 14 of the Indian Act) they had the right to sell the goods. It was also held that the sellers had also broken the implied warranty as to quiet possesson of the goods.

If the buyer has used the goods to some extent before the seller's want of title is discovered, the breach of contract and failure of consideration on the seller's part are not affected. A breach of this condition is not one which is waived by "acceptance" of the goods, if the seller'e title was unknown to the buyer defective. Thus a buyer of a motor car who was deprived of the same owing to the seller's want of title was held entitled in *Rowland* v. *Divall*[2] to recover the full price from the seller even though he had used the car for some months.

Again, the seller has no right to sell if the sale is without jurisdiction or is illegal.[3] *Summer etc. Co* V, *Webb & Co.* (1922) 1 K. *B.* 55 where the seller was not liable though the sale of the goods in the country where they were sent was illegal.

In *Dickenson* v. *Naul*[4] and in *Allen* v. *Hopkins*[5], it was decided that where a party had caught and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first seller for the price.

It may also be noted that as in the case of other condititions, the buyer may, on a breach, either sue for a return of the price as on a total failure of consideration where he has been compelled to surrender the goods to the true owner, or he may elect to treat the condition as a warranty and sue for unliquidated damages for its breach.

There is an implied warranty of title in the case of the sale of goods and the *onus* is on the seller to prove his title to the goods sold by him. In a suit by the plaintiff who hae been deprived of the property purchased by him from the defendant in pursuance of an order of a Criminal Court which held the property to be stolen property, the *onus* is on the defendant to prove that he had title to the property[6].

(1921) 3 K. B. 387 ; 90 L. J. K. B. 984 (C. A.).

(1923) 2 K. B. 500 ; see also Mercantile Union Guarantee Corporation v. Wheatley (1937) 4 A.E.R. 713 (applies to Hire Purchase agreements); Felston Tile Co. v. Winget (1936) 3 A. E. R. 473.

3 Durab Ally v. Khajah (1878) 5 I. A. 116=3 Cal. 806, without jurisdiction.

4 (1833) 4 B. & Ad. 638.

5 (1844) 13 M. & W. 94; 13 L. J. Ex. 316.

6 Kishan v. Bishan=A. I. R. 1925 Lah. 366= 86 I. C. 1020=26 P. L. R. 160.

There is no such condition or warranty in official sales, *e.g.* sales by Sheriff. In these casse he sells only such interest as the debtor may have in the goods;[1] but if the Sheriff acts without jurisdiction (*e g.* seizes property beyond jurisdiction) he stands in the same footing as an ordinary person.[1] Where the judgment debtor has a saleable interest however small, the purchaser buys it at his own risk[2]. It was held onder the C.P.C. of 1882 that the purchaser could recover the purchase money on the ground that the judgment debtor had no saleable interest[3]. In *Framji* v. *Hormasji*[4] the assertion that the goods were the property of the judgment debotr was held to amount to a warranty.

As regards the position of an auctioneer, see notes under section 64.

Warranty of quiet possession.

Under clause (b) above, where the buyer has obtained possession of the goods and his right to possession and enjoyment of the goods is in any way disturbed, he has a right to sue the seller for damages so caused, unless the circumstances of the contract are such as to show a different intention. In *Howell* v. *Richards*[5], a case relating to immoveable property Lord Ellenborough observed :

> "The distinction between the condition as to title and the warranty of quiet possession is similar to that between a covenant for title and one for quiet enjoyment The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey : the latter is an assurance to the grantee against the consequences of a defective title'

In *Niblett* v. *Confectioners' Materials Co.*[6] Atkin L J. said :

> "Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations and only purports to protect the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortious acts of the vendor himself."

The scope of section 12 (2) of the English Act was thus stated by Lord Russell C. J. in *Monforts* v. *Marsden*[7]:

"What that undoubtedly meant is that no body shall interfere with the possession of the goods by reason of want of title of the vendor. or of any act done or committed by any one having authority from the vendor. It is little more than a covenant for title. It is a warranty that the vendor shall not, nor shall anybody claiming under a superior title, or under his authority, interfere with the quiet enjoyment of the vendee "

The remedy afforded by this clause does not, however, seem to be of much value. The condition as to title amounts to an under-

1 Dorab Ally v. Khajah (1878), 3 Cal. 806 P. C.

2 Sonaram v. Mohiram, (1900), 28 Cal. 235.

3 Ram Kumar v. Ram Gonr (1909) 13 C. W. N. 1082 ; see also Moitheensa v. Apsa (1911) 36 Mad 191.

4 (1877) 2 Bom. 258. See also Expaite Villars (1874) L. R. 9 Ch. 432, 437. Peto v. Blades (1814) 5 Taunt 657.

5 (1809) 103 E. R. 1150 ; 11 R. R. 287.

6 (1921) 3 K. B. 387 ; 90 L J. K. B. 984 (C. A.).

7 (1895) 12 Pat. Cas 266. See also Jones v. Consolidated Collieries Ltd. (1916) 1 K. B. at p. 136 where the true limits and extent of the covenant for quiet enjoyment under a mining lease are discussed.

taking by the seller that he has the complete right of the disposal of the goods, as already referred to above, and if by reason of the seller's defective title the buyer is subsequently disturbed in his possession of the goods by the lawful act of a third party, the condition as to title is broken and the buyer gets his remedy. Warranty given by clause (*b*) would obviously be unnecessary in such a case. Similarly, when the buyer is prevented from obtaining possession of the goods by such an act, section 31 of the Act appears to afford sufficient remedy to the buyer. The same remarks apply to other breaches of contract or tortious acts of the seller. Under the Civil Law [from which section 12 (2) of the English Act is borrowed] the warranty against eviction gave a very necessary and practical remedy, as the seller did not profess to transfer ownership, but only undisturbed possession[1], and clause (*b*) seems to be of practical use in such cases only.

It may be observed that the warranty is that the buyer shall "have and enjoy." If "have" is to be interpreted as meaning "obtain" the word is unnecessary, as the seller is already liable under a condition to deliver the goods[2]; moreover, the word "enjoy" includes the meaning that the buyer shall get possession[3].

Benjamin has observed[4]: "The implied warranty of quiet possession, if the analogy of covenants for quiet possession under leases be a sound one, is a warranty against disturbance, and is not broken unless and until a disturbance has taken place. As it is couched in wide terms it should receive a reasonable construction and like all contracts for a general indemnity, should not be construed to extend to the tortious acts of strangers." The implied warranty will probably be construed similarly to express contracts of indemnity or for quiet enjoyment, that is to say, as applicable to *all* acts of the seller, but only to *lawful* acts of third persons[5].

Thus, if the title is defective, the buyer may, under clause (*a*), reject the goods, but if he has accepted them and is afterwards disturbed he has under clause (*b*) his remedy by action for breach of the warranty of quiet possession, the right of action arising on disturbance.

Warranty of freedom from encumbrances—sub-section (c).

The second implied warranty afforded by clause (*c*) is that the goods *shall* be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made, or in other words, that the buyer's possession shall not be disturbed by reason of the existence of such incumbrances. A breach of this warranty will occur when the buyer discharges the amount of the incumbrance[6]. The practical effect of it appears to be that, if buyer does discharge such an encumbrance, he may recover the amount from the seller, by virtue

1 See Benjamin on Sale, 7th Edn., p. 707.
2 See Buddle v. Green, (1857) 27 L. J. Ex. 33.
3 Ludwell v. Newman (1795) 6 T. R. 458.
4 Benjamin on Sale, 7th Edn., p. 707.
5 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 59.
6 Collinge v. Heywood (1839), 9 A. & E. 633; See also Nottidge v. Dering (1909) 2 Ch. at p. 656.

of the provisions of section 69 of the Indian Contract Act, as it will not be a voluntary payment. This clause obviously will not apply if such encumbrances are declared to the buyer when the contract is made or he has notice of them.

Shares in company

As already noted, shares in a company are goods within the meaning of the Act. In the case of a contract of sale of such shares, therefore, there is an implied warranty under S. 14 (c) of the Act, that the shares are free from any charge or incumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made, unless the circumstances of the contract are such as to show a different intention. Assuming that the circumstance that the shares are sold by a pledgee of those shares under a power of sale shows a different intention within the meaning of the section, that circumstances can show different intention on the part of the parties to the contract only if it is known to the buyer. The burden is on the seller to show that the buyer was aware that the seller was selling not as owner but as pledgee. A buyer of shares in a company must, no doubt, be presumed to have notice of the provisions of the Articles of Association of the company with respect to the shares generally. But it does not follow from that he is to be presumed to have notice of circumstances affecting particular shares. If, therefore, the Articles of Association of a company provide that the directors may decline to register any transfer of shares upon which the company has a lien, the buyer will be presumed to have notice that shares in the company are liable to be effected by a lien where the registered shareholder is indebted to the company, but the buyer is still entitled to rely on the implied warranty given by the seller under S. 14 (c) that the shares with which he proposes to fulfil the contract are not shares which are so affected.[1]

Breach of implied warranty-remedy of buyer

Where there is a breach of the implied warranty under S. 14 (c) of the Act, the remedy of the buyer is to sue for damages. He is not entitled to ask for rescission of the contract.[1]

Sale by description

***15.** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

1 Kissenchand v. Ram Pratap, 44 C. W. N. 505.

* **Analogous law.**

Section 13 of the English Sale of Goods Act, 1893, which is the same as the present section in the Indian Act.

Repealed section 113 of the Indian Contract Act, 1872, which ran as follows :—

"Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Explanation. But if the contract specially states that the goods though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

Analogous law.

This section corresponds to section 13 of the English Sale of Goods Act, 1893. Section 113 of the Contract Act (since repealed) contained similar provisions where the words were "where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination." The word "denomination" appears in some of the earlier English cases, but the word "description" is more convenient. It is to be remembered that in the Contract Act the word "warranty" had often been used, as in this case, in the sense of a 'condition.'

Sale by description—implied condition.

This section represents a universal principle—*Si aes pro auro veneat non valet.* "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it[1]." In a contract for the sale of goods by description, there is thus an implied condition that the goods shall correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

The section applies whether the goods are unascertained or specific, or whether the buyer had an opportunity of examining the goods or not. The sole question is whether the buyer relied on the description above, *i e.*, whether the description was the basis of the contract or whether it merely amounted to a collateral warranty. Previous inspection of the goods by the buyer may be evidence that the buyer did not depend on the description alone as a condition, but not conclusive[2]. The goods are not only to be described but they must be *contracted for* by description; that is to say, the buyer must rely on the description.

No definition of what constitutes a description has been given. At common law, the most usual instance of a contract of sale of goods "by description" was an agreement to sell unascertained or future goods of a certain description *i.e. kind* or class. In *Heyworth* v. *Hutchinson*[3], a case where specific bales of wool were sold "guaranteed about similar to samples," and the question was as to the right of the buyer to reject them for inferiority, Blackburn J. said: "generally speaking, when the contract is as to *any* goods, such a clause is a condition going to the essence of the contract, but when the contract is as to specific goods, the clause is only collateral to the contract."

A specific chattel could also be sold by description at common law. Here some distinction existed. Unascertained goods can have no description but what is given them by the contract, but a specific chattel had also a physical identity, either corporeally present in the sight of the buyer or mentally identified by him. As a general

1 Bowes v. Shand (1877) 2 App. Cas. 455, per Lord Blackburn at p. 480.

2 Varley v. Whipp. (1900) 1 Q. B. 513.

3 (1867), L. R. 2 Q. B. 447, at p. 451; 36 L. J. Q. B. 270.

rule, a contract for the sale of a specific article was a contract for that article as it was[1]. The property passed by the contract, and any superadded description was either a mere representation having no legal effect (except where it was fraudulent, or, being material, justified the buyer in repudiating the contract on the ground of misrepresentation) or was at most a warranty or collateral engagement entered into by the seller in consideration of the contract of sale, on breach of which he was liable in damages. But if the circumstances of the case showed that the description given to specific goods was *essential to their identity* as the subject-matter of the contract, in other words, that the buyer contracted for them *as described*, so that the falsity of the description made the goods substantially different things from those that were described, so as to constitute a failure of consideration, the sale was by description[2]. As an illustration of it, it was decided in *Lomi* v. *Tucker*[3] that a buyer who had brought two pictures described as "a couple of Poussins" could reject the pictures if not genuine works of that artist[4].

Ordinary common law principles described will apply under the Act also[5]. The term would probably apply also to a case in which the buyer had seen the goods, but relied, at least in part upon the description. In *Varley* v. *Whipp*[6] the plaintiff contracted to sell to the defendant a "self-binder" reaping machine, which he described as having been used one season, and having cut only about fifty to sixty acres. The defendant, who had not seen the machine, said he would take it on the plaintiff's word, as according to the plaintiffs description, the machine was practically new. The statement that the machine had cut only fifty to sixty acres was untrue. The defendant rejected the reaper, writing to the plaintiff: "It is not what I expected etc." The plaintiff sued for the price. *Held*, that the sale was by description and the defendant was not liable.

Illustrations

It depends upon the construction of the contract whether any statement is a description, or a collateral warranty only, or a mere representation[7]. Similarly, it is a question of fact whether the thing delivered be what was really intended by both parties as the subject-matter of sale, although not very accurately described[8]. The following examples by way of illustrations may be studied with advantage :

(1) The plaintiff agreed to sell to the defendants two parcels of sawn laths "of about the specification" mentioned, the property to pass to the buyer on shipment and "should any dispute arise under the stipulations of the contract, the buyers should not be entitled to reject any of the goods but the dispute should be referred to arbitrators." The goods did not substantially agree with the specification. *Held*, that the arbitration clause applied only to goods substantially

1 Per Belt L. J. in Robertson v. Amazon Tug Co. (1881), 7 Q. B. D 598, at 606.
2 Per Blackburn J. in Kennedy v. Panama Mail Co. (1867), L. R. 2 Q. B. 580.
3 (1829), 4 C. & P. 15 ; 34 R. R. 769.
4 See Benjamin on Sale, 7th Edn., pages 635 to 637, from which the above has been digested.
5 See Ibid, p. 638.
6 (1900) 1 Q. B. 513.
7 Allan v. Lake (1852), 18 Q. B. 560 : p. 566.
8 See Mitchell v. Nowhall 15 M. & W. 308 ; 15 L. J. Ex. 292.

of the description contracted for, and the buyers could reject the goods as not being of such description[1].

(2) In *Shepherd* v. *Kain*[2] a vessel was advertised for sale as a "copper-fastened" vessel, on the terms that she was to be "taken with all faults, without allowance for any defects whatsoever". She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. *Held*, that the seller was liable for the misdescription, the court saying that the words "with all faults" meant all faults which the vessel might have "consistently with it being the thing described," i.e. a copper-fastened vessel.

(3) Sale of copra cake 'not warranted free from defect rendering some unmerchantable, which would not be apparent on reasonable examination.' The cake was adulterated with castor beans so that it could not be described as copra cake. The buyers having accepted the goods were held still entitled to recover damages for the breach of the condition[3]

(4) In *Nicol* v. *Godts*[4] the sale was of 'foreign refined rape oil, warranted only equal to samples'. The oil tendered corresponded with the sample, but was adulterated with hemp oil. The jury found that such an admixture was not commercially known as 'foreign refined rape oil', but that the buyer knew what he was buying. The buyers were held entitled to reject the oil.

(5) In *Wallis* v. *Pratt*[5] the sale was by sample of a quantity of seed described as 'common English sainfoin.' The sellers delivered giant sainfoin, a different kind of seed, the difference not being discoverable except by sowing, and the defect also existing in the sample. The contract of sale contained a clause that 'the sellers gave no *warranty* express or implied as to growth, description, or any other matters.' It was when the crop was produced that it was found that it was giant sainfoin. *Held*, that the buyer may recover damages for the breach of the condition.

(6) In *Gompertz* v. *Bartlett*[6], the sale was of a foreign bill of exchange ; it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described : the court, however, saying that the decision would have been otherwise had the defect been one consistent with the character of a bill.

(7) Where 3,100 cases of Australian canned fruits represented to be packed thirty tins to a case were sold and it was found on delivery that part of the cases contained thirty and the rest twenty-four tins to a case, though there was no difference in price, it was

Vigers v. Sanderson (1901) 1 K. B. 608; 70 L. J. K. B. 383.
5 B. & A. 240; 24 R. R. 344 ; but see Taylor v. Bullen, 5 Ex. 779 ; 20 L. J. Ex. 21 ; 82 R. R. 875 where in a very similar case a vessel described as a "barge, A. I, teak—built" with the terms "with all faults, and without any allowance for any defect or error whatever" and the vessel was not teak built, was held not to constitute binding description.
Pinnock Brothers v. Lewis & Peat Ltd. (1923) 1 K. B. 690.
10 Ex. 191 ; 23 L. J. Ex. 314 ; 102 R. R. 523.
(1911) A. C. 394.
2 E. & B. 849 ; 96 R. R. 851.

held that this formed part of the description and the buyer could reject the whole[1].

(8) in *White Sea Timber Trust* v. *North*[2] there was a contract for the sale of timber containing a term that the goods were to be shipped "under deck[2]." The buyer was held entitled to reject the whole shipment when it was found that a quarter of the whole quantity was shipped "on deck" and had suffered injury by being so carried. The term was treated as part of the description.

In a recent case reported as *Messrs Ltd.* v. *Morrison Export Co.*[3] where the contract contained a similar condition 'to be loaded on deck one-third' and in fact more than a third was shipped on deck, the buyers were held justified in rejecting the goods.

(9) In *Arcos* v. *Ronaasen & Co.*[4] the contract was to supply timber of ½ inch thickness for being made into cement barrels. The timber supplied varied in thickness from ½ inch to ⅝ inch. Yhe House of Lords held that the buyer was entitled to reject the timber on the ground of a breach of condition as to description though it was merchantable and commercially fit for the purpose for which it was ordered.

(10) A shipment of Siam rice in single bags was held liable to rejection where the contract was for Siam rice packed in 'double bags'—more easily saleable and essential for transit to a long distance[5].

(11) Where the contract was for the purchase of 'new singer cars' and one of the terms excluded liability 'for all warranties or conditions implied by common law, statute or otherwise,' the court held that the supply of a used car amounted to a breach of contract the breach being of an express term amounting to a description and not of an implied term[6].

(12) In the case of an instalment contract, each instalment must conform to the description. Where carcases were to be shipped in two instalments (to be considered as separate contracts) "average weight not to exceed 62 lbs.", it was held that each shipment must not exceed the average of 62 lbs. and it was not enough if the average of two shipments did not exceed 62 lbs.[7]

(13) In *Johnson* v. *Raylton*[8] it was held that on the sale of goods by a manufacture of such goods who is not otherwise a dealer in them, there is (in the absence of any usage in the particular trade, or as regards the particular goods, to supply goods of other makers) an implied condition that the goods shall be those of the manufacturer's own make, and the purchaser is entitled to reject others, although they are of the quality contracted for. .

1 Moore & Co. v. Landauer & Co. (1921) 2 K. B. 519.
2 (1934) 148 L. T. 263.
3 (1939) 1 A. E. R. 92; see also Wilson v. Wright, (1937) 4 A. E. R. 371 (Agreement to load by Saturday's steamer—steamer heavily laden and so loaded later—right to reject).
4 (1933) A. C. 470.
5 Makin v. London Rice Mill Co. (1869) 20 L T. 705.
6 Andrews Bros. v. Singer & Co. (1934) 1 K. B. 17.
7 Ballantine v. Cramp, (1929) 129 L. T. 502.
8 7 Q.B.D. 438; 50 L. J. Q. B 753 (C.A.)

(14) Where a purchaser forwarded a written order to the vendor for 'scarlet cuttings,' to be shipped on his account for the Chinese market, and the vendor sent on board a different article, it was held that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China the goods which he had ordered[1].

(15) Sale of "the cargo" on board a named ship as per certain bills of lading; other goods of a different kind smuggled on board were not mentioned in the bill of lading; held, buyer was not entitled to reject[2].

(16) In *Sazuki & Co.* v. *Uttamchand*[3] the defendants agreed to buy sugar of certain description, shipment November to December, free Bombay Harbour. Held, there was no condition that the goods were to be imported by the sellers directly, and tender of goods of contract shipment, quality and description imported by another firm, was a good tender.

(17) A contract to sell goods to be ordered from Europe was held not fulfilled by offering goods of same quality purchased from a firm in Bombay[4].

The implied condition that the goods shall answer to the description under which they are sold is not excluded by an express but inconsistent warranty or condition in the contract[5] or by a provision negativing any responsibility on the part of the seller[6]; or stipulating for an allowance for inferiority in quality[7]; or excluding a right of rejection; or providing for arbitration in case of dispute[8]. No such stipulation under which the goods are sold, although it may be construed so as to show that the goods were not in fact sold under any particular description[9]. Where, however, several statements are made about the goods, a clause excluding liability for errors of description may turn one or more of such statements into mere representations[10].

"The general principle of this implied condition is clear and founded upon the consensual basis of the law of contract. If the descriptiption of goods tendered is different from that of the goods agreed to be sold, it is not the article bargained for and the buyer is not bound to take it. While it is possible in theory to exclude this implied condition by express agreement[11], the courts are reluctant to construe the contract so as to permit this to be done, and clauses in contracts for the sale of goods purporting expressly to exclude the implied condition that the goods shall correspond with the description are narrowly construed so as to avoid, as far as possible, defeating

1 Bridge v. Wain, 1 Stark 504.
2 Paul v. Pim & Co. (1922) 2 K. B. 360.
3 (1925) 50 Bom. 318.
4 Bombay United Merchants Co. v. Doolubram (1887) 12 Bom. 50, 62.
5 Section 16 (4).
6 Howcroft v. Laycock (1898), 14 T. L. R. 460 ; Wallis v. Pratt, supra.
7 Azemar v. Casella, infra.
8 Vigers v. Sanderson, (1901) 1 K. B. 608 ; 608 Pinnock v. Lewis and Peat, supra.
9 See Benjamin on Sale, 7th Edn., pp. 645, 646.
10 Taylor v. Bullen, 5 Exch. 779; Reynolds v. lorench, 23 L. J. N. C. 27 ; Howcroft Watkins v. Perkins, 16 T, L R. 217.
11 Section 62 of the Act.

the fundamental right of a buyer to receive the article bargained for.[1]"

"In general on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description and if they do not, it is unnecessary to put any other question to jury[2]". Whether, therefore, the property in goods sold passes to the purchaser or not, he is entitled to reject the goods if they are not in accordance with the description in the contract, provided that the description forms an actual part of the conditions of the contract and not something collateral to it. "Under the law in this country a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for[3]."

Effect of examination of bulk or sample.

Examination of bulk or sample does not necessarily negative a sale by description[4]. But an examination, where, at least the nature of the goods is discoverable, may show that the buyer bought on his own judgment, and not by description[5]. In *Attwater* v. *Kinnes*[6] a specific bulk of Arctic mica, lying in the rough, as came from the quarry, on the seller's premises, was on two occasions exhibited to and inspected by the buyers, who agreed to buy the lot, described as "all the block mica in stock." and also as "the whole stock of the mica in blocks as they lie." It was held that the sale was an ordinary sale of specific goods of the bulk as it lay, without warranty or condition, and not a sale by description.

Misdescription.

The defendant Railway Company invited tenders for certain goods which they wanted to dispose of. These goods included 'mild steel special wheels.' The plaintiff sent a tender for these goods, which wrs accepted. One of the conditions of tender and sale was to the effect that "the quantities and descriptions of the materials to be purchased are believed to be correct and appropriate." It was also stipulated that "the tender and sale shall not be invalidated and no compensation for misdescription of the whole or any portion of the lots or items shall be admissible because of any divergence from the particulars entered in the schedule." The plaintiff had the option of inspecting the goods before taking delivery but he did not do so. On delivery the plaintiff discovered that the goods were of wrought iron and not of steel. *Held*, that although the company believed the goods to be of mild steel they did not give any guarantee and that the conditions of sale made it clear that if it turned out to be a case of misdescription they would not be liable for any damages

1 Halsbury, Laws of England, 2nd Edn., Vol. XXXIX, p. 62.
2 Jones v. Just (1868) L. R. 3 Q. B. 197, 204.
3 Mitchell Reid & Co. v. Buldeo Dass Krettry (1887) 15 Cal. at p. 5.
4 Josling v. Kingsford (1866), 13 C. B. (N. S.) 447, Tye v. Fynmore (1813), 3 Camp. 472.
5 Prosser v. Hooper (1817), 1 Moore (C. P) 106 : Parsons v. Sexton (1847), 4 C. B. 899.
6 Cited at p. 641 of Benjamin on Sale, 7th Edn.

and that in the circumstances the plaintiff took delivery of the goods at his own risk[1].

Where the parties are really agreed on the thing sold a mere misdescription of it in the contract is immaterial for *falsa demonstratio non nocet cum de corpore constat* or as Bacon would put it—*Proesentia corporis tollit errorem nominis*[2].

Goods sold under a trade name.

Where goods are sold *as being* of a particular *brand*, the brand is part of their description; and if goods sold as being of a particular brand do not bear that brand, the buyer can reject them, though the goods were in fact made by the manufacturer of the particular brand[3]. A buyer ordering an article by its trade name must be taken to have ordered it as manufactured at date of order, whatever its previous composition[4] The common law is illustrated by the cases given below.

The course of dealing between the parties may show the meaning of the terms used, and so establish a sale by description. In *Bostock & Co Ltd.* v. *Nicholson & Sons Ltd.*,[5] the defendants contracted to sell to the plaintiffs sulphuric acid. The plaintiffs were sugar refiners and manufacturers of brewing sugars in the shape of invert and glucose ; but the purpose for which the sulphuric acid was required was never communicated to the defendants. The order given to the defendants was for 'B. O. V.' or brown oil of vitriol. It was held that "B O V" meant sulphuric acid commercially free from arsenic, and that there had been a sale by that description under section 13 of the English Act. And a particular description may attach to the goods by estoppel. Thus, on a sale of "oats," the seller may be aware that the buyer thinks he is being promised old oats[6].

In *Allan* v. *Lake*[7] it was held that a sale of turnip-seed as "Skirving's swedes" was not a sale with a mere representation, not part of the contract, but by description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's swedes."

In *Wieler* v. *Schilizzi*[8] the sale was of "Calcutta linseed, *tale quale*." There was evidence that all linseed imported contained an admixture of from two to three per cent. of other seeds, but the article delivered contained an admixture of fifteen per cent. of mustara. It came, however, form Calcutta, and the plaintiff had sold it and it had been used as linseed. It was found that the article had lost "its distinctive character" so as not to be saleable as Calcutta linseed. Action of the purchaser for breach of warranty was

1 B. B. & C. I. Railway v. Firm Nihal Chand Jagan Nath, 192 I. C 175=13 R. L. 363.
2 Chalmers.
3 Scaliaris v. Ofnerberg (1920), 37 T.L.R. 307 (C. A.). See also Taylor v. Buller (1850) 5 Ex. 779.
4 Harris & Sons v. Plymouth Varnish & Colour Co. (1933), 49 T. L. R. 521.
5 (1904) 1 K. B. 725.
6 Smith v. Hughes (1871), L. R. 6 Q. B. 597.
7 18 Q. B. 560.
8 17 C. B. 619 ; 25 L. J. C. P. 89 ; 104 R. R. 815 ; see also Hopkins v. Hitchcock 14 C. B. (N. S.) 65 ; 32 L. J. C. P. 154 ; 135 R. R. 605.

upheld, though it is plain that the purchaser might before resale have rejected the contract *in toto*.

A statement of quality or ingredients whether part of a description—other conditions regarding place of origin, size of bags etc.

According to section 2(12) of the Act, "quality of goods" includes their state or condition. Where a statement of quality or ingredients is added to the ordinary commercial denomination of the goods sold, a question may arise whether the statement forms part of the description. In the older cases stipulations, express or implied, as to the quality of the goods were treated as part of their description: the Act, however, deals with them as separate conditions in sections 16 (2) and section 17.

Goods are sold by description where the buyer enters into the contract of sale in reliance on the description of the goods by or on behalf of the seller (*Varley* v. *Whipp* 1900, 1 Q. B. 513). The expression "description" usually means a particular class or kind of goods; but it also includes any statement which may be essential to the identity of the goods as contracted for, as *e. g.*, as to their place of origin or of shipment, time of despatch or delivery, mode of packing, etc. The question is whether the untruth of the statement makes the goods delivered or tendeted different things from what were contracted for[1]. "The place of origin, the size of the bags containing the goods, the average weight of the parcels, and the mode of packing of the goods may also constitute part of the description of the goods". 'Ex store' has been held to be part of the contractual description of goods not satisfied by the tender of goods in lighters[2]. In another case where the sale was of beans in bags *per S. S' Luzo* 'afloat,' it was held that 'afloat' was used in reference to the goods and was a condition of the contract. So also the description of goods as "under deck" has been held to be a condition of the contract. On the other hand, a term of a contract that timber sold should be properly seasoned for shipment has been held to be a warranty only and not a condition[3]".

Where bales of yarn of Hanuman quality (a quality bearing the trade mark of Hanuman) were sold and the inspection of bales was confined to their exterior and after delivery the yarn was found to have been eaten by white ants and as such unfit for ordinary use, it was held that the buyer was entitled to claim damages as on a

1 See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 59.

2 Fisher Reeves, etc. v. Armour & Co., (1920) 3 K. B. 614,

3 Benjamin on Sale, 7th Edn., pp. 647, 648 and the authorities cited therein; Bonabu v. Produce Brokers Ltd. (1921) 37 T. L. R. 851. C. A. (goods bought afloat but in fact discharged; Ballantine & Co. v. Cramp and Bosman (1923) 129 L. T. 502 (weight); Barker (Junior) & Co. v. Agius, Ltd. (1927) 33 Com. Cas. 120, 53 T. L. R. 751 (briquettes of a certain size); Moore & Co. v. Landauer & Co. (1921) 2 K. B. 519, C. A. (mood of packing); Daeyton Price & Co., Ltd. v. Rahomotollah A. I. R. 1925 Cal. 609=86 I. C. 571 (place of shipment); Parthasarathy Chetty & Co. v. T. M. Gajapathy Naidu & Co. A. I. R. 1925 Mad. 1258= 48 Mad. 787=91 I. C. 568 (design); Re Andrew Yule & Co. A. I. R. 1932 Cal. 879=140 I. C. 877=59 Cal. 928 "Standard Mills Make": contrast Sazuki & Co. v. Uttamchand Maneklal, A. I. R. 1926 Bom. 431 (imported goods need not be imported by seller direct).

breach of warranty as the goods did not correspond to the description[1]. Where, however, there was sale of goods bearing a particular number and the article tendered bore a different number but it was found that the goods tendered were in fact the contract goods and that the figures inserted in the contract were so inserted by reason of a clerical error, it was held that the numbers on the bales gave no warranty or indication of quality or description and were as such immaterial.[2] In *Ishar Das* v. *Khaunu Mal*[3] numbers on bales did not correspond to the numbers given in the invoice. It was held that the buyer could not reject unless it was a condition that the bales should bear particular numbers.

Sale by sample as well as description.

This section also lays down that if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. The goods supplied must be in accordance with both the description and sample[4]. Illustration (*b*) to repealed section 112 of the Indian Contract Act, 1872, was as follows :

> "A buys, by sample, and after having inspected the bulk, 100 bales of "Fair Bengal" cotton The cotton proves not to be such as is known in the market as "Fair Bengal'; there is a breach of warranty[5]".

Thus the implied condition that goods bought under a specified commercial description should conform therewith is not excluded by the fact that the sale is also by sample. A sample is a mere expression of the quality of the article, and not of its essential character, and, although the bulk may agree with the sample, if it does not reasonably answer to the description, the seller is liable[6]. In *Gardiner* v. *Gray*[7] the contract was for sale of 12 bales of " waste silk " imported from the continent, and samples were shown, though the bargain was made without reference to the sample. It turned out that the goods were not saleable as ' waste silk.' It was held that there had been a breach of a condition. And this is whether the purchaser has an opportunity of inspecting the goods and judging for himself or not. In *Josling* v. *Kingsford*[8], the sale was of oxalic acid and the bulk had been examined and approved, and a great part of it used by the purchaser, and the seller declined to warrant quality. On analysis, it was afterwards found to be chemically impure from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver " oxalic acid " and the other for breach of warranty that the goods delivered were " oxalic acid." *Held*, that although there was no evidence of a warranty, the

1 Pear Mohammed v. Dalooram, (1918) M. W. N. 658.
2 Ramjiwan v. H. Bhikaji & Co., (1924) 48 Bom. 519 P. C.
3 (1927) 8 Lah. 276.
4 Khirendra Nath v. Secty. of State, 44 C. W. N. 1069.
5 It may be pointed out that the use of the word "warranty" in the illustration is inaccurate.
6 Mody v. Gregson. (1868) L. R. 4 Ex. 49, at pp 55, 56.
7 (1815) 171 E. R. 46 ; 16 R. R. 764 ; see also Tye v. Fynmore, (1813) 170 E. R. 1446 ; 14 R. R. 809 (contract for merchantable Sassafras wood—sample shown—finding that it did not answer to description.
8 13 C. B. (N. S.) 447 ; 134 R. R. 596.

article did not come under the denomination of " oxalic acid " in commercial lauguage.

Just as in cases where the goods are not sold by sample, a special term in the contract in favour of the seller (such as a clause providing that inferiority in quality of bulk to sample shall be a matter for allowance) does not deprive the buyer of his right to reject the goods if they do not answer the description in the contract, for he did not undertake to accept goods differing in kind from those for which he had bargained[1]. Still less will any such provision avail the seller if the bulk does not correspond with the sample at all. Thus in a case of a contract for the sale of cotton guaranteed equal to a sample which was of Longstaple Salem Cotton, it was stipulated that " should the quality prove inferior to the guarantee a fair allowance to be made " and the bulk turned out to be not Longstaple Salem, but exceptionally good Western Madras, which however is inferior to Longstale Salem and cannot be manufactured with the same machinery, it was held that the buyer was not bound to accept[2].

Where, however, a sample is given not as an expression of the *quality* of the goods, but as the only *description*, so as to constitute the sole touchstone of the contract, the vendor is bound only to deliver stuff the same as the sample[3]. Thus, in *Carter* v. *Crick*[4] the sale was by sample of an article which the seller called seed barley, but said he did not know what it really was, and the bulk corresponded with the sample. *Held*, that the seller's warranty was confined only to a correspondence between the bulk and the sample.

Sale of specific goods by description.

As has already been observed, a specific chattel could also be sold by description at common law and the same principle applies under the Sale of Goods Act. This may well occur in a case where the buyer has never seen the goods[5] and may also occur where he has seen them[6]. In the latter case, however, it is more difficult for the buyer to show that the sale was a sale by description, for usually the contract for the sale of a specific article is a contract for the article as it is; and descriptions of it at the most amount to a warranty for the breach of which the buyer can only recover damages. Thus, in *Parsons* v. *Sexton*[7], a contract for a specific engine, described as a "fourteen horse engine," and which had been inspected by the buyer's agent, was held to be a contract for the particular engine without any condition (though there might be a warranty) that it would do work equal to that of fourteen horses. Where the

1 See Mody v. Gregson cited above.
2 Azemar v. Casella (1867) L. R. 2 C. P. 431, affirmed, ib. 677.
3 Mody v. Gregson, supra.
4 28 L. J. Ex. 238.
5 See Varley v. Whipp (1900) 1 Q. B. 513, cited at page supra. Channell J. observed : "I think it (section 3 of the English Sale of Goods Act, 1893) applies to all cases where the purchaser has not seen the article sold and relies on the description given to him by the vendor. I think it would most frequently apply to unascertained goods, but it does not follow that it may not, in some cases, apply to specific goods."
6 Thornett & Fehr v. Beers & Son, (1919) 1 K. B. 486 ; cf. Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (1928) 33 Com. Cas. 195, H. L.
7 (1847) 4 C. B. 999 ; 16 L. J. C. P. 181.

specific goods were before the parties at the time of the negotiation, it was held that the sale was not by description or denomination.[1]

The statement made about the article must be essential to its identity, and if it does correspond with the description, the buyer must take it. In *Barr* v. *Gibson*[2] the defendant sold to the plaintiff, "all that ship or vessel called *The Sarah*; of New Castle etc.," covenanting that he "had good right, full power, and lawful authority" to sell. It turned out that the ship had gone ashore eight days before the sale. It was held that the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off and that she was still a *ship*.

If the purchaser, instead of going in person to a shop, and selecting the goods himself, sends an order describing what he wants, the vendor, if he accepts the order, must select and send an article which fairly corresponds with the description. And this is so whether the purchaser has an opportunity of inspecting the goods and judging for himself or not[3]. Occasionally where goods are sold over the counter to a customer who asks for the goods, the sale may be a sale by description[4], though usually a customer who buys goods in a shop across the counter is buying specific goods.

Sale of stocks and shares.

"Goods" under the Indian Act include stocks and shares. The English Act does not apply to the sale of stocks and shares and like things, but the general principles relating to the sale of goods govern such transactions. Tho broad rule in England appears to be that where the thing forming the subject of transaction is something essentially different from what it is supposed to be, for instance, a forgery[5], or something unmarketable because it is not properly stamped[6], the sale can be rescinded by the buyer and he can recover the purchase price. In *Young* v. *Cole*[7] the plaintiff, a stock-broker, was employed by the defendant to sell for him four guatemala bonds in April, 1836, and it was shown that in 1829 unstamped guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the Stock Exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. *Held*, that the defendant was bound to restore the price received. In *Westropp* v. *Solomon*[8] the same rule was recognised and it was also held that in such cases nothing further was recoverable from the seller than the purchase-

Fateh Chand v. Lachmi Narain, 57 I. C. 481.

3 M. & W. 390; 7 L. J. Ex. 124: 49 R. R. 650

Tye v. Fynmore, 3 Campb. 462; Josling v. Kingsford, 3 C. B. (N. S.) 447; 32 L. J. C. P. 94.

Wren v. Holt (1903) 1 K. B. 610. C. A.; Morelli v. Fitch & Gibbons (1928) 2 K. B. 636

5 Jones v. Ryde (1814) 5 Taunt. 488; 15 R. R. 561 (forged naval bill); Gurney v. Womersley (1854) 4 E. & B 133, 99 R. R. 390 (bill of exchange bearing a forged endorsement).

6 Gomportz v. Bartlett (1853) 2 E. & B 849, 95 R. R. 851.

7 3 Bing N. C. 724.

8 8. C. B. 345; 19 L. J. C. P. 1; 79 R. R. 530.

money he had received. and that he was not responsible for the value of genuine shares[1].

But there must be a complete difference in substance between the thing bargained for and the thing obtained, the mere fact that it is something less valuable than it was supposed to be will not make it something different so that it can be said not to answer the description. In such a case the buyer must go further, if he desires to rescind the contract and recover the price, and prove misrepresentation[2] though perhaps it is not now necessary for him to prove that the misrepresentation was fraudulent[3].

Evidence of trade usage.

Parol evidence may be given[4] of the trade meaning. of the description contained in the contract although on ordinary principles, parol evidence is not admissible to vary or to negative the description contained in a written contract[5].

In case of a contract in writing, evidence of trade usage not inconsistent with the terms may be admitted to explain or supplement those terms[6]. And it seems that the usage of a particular trade to treat a condition as to quality as a mere warranty may be supported. Where, however, the article tendered answers to the description the buyer must take the risk as to its quality and condition[7].

Damages.

A buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the contract and is not liable for damages which the vendor may have suffered on account of such refusal.[8]

To recover special damages for a breach of warranty in a re-sale it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he resells or deals with them.[9]

Implied conditions as to quality or fitness

16. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

1. Analogous to such cases are the sale of a life insurance policy or an annuity when, unknown to the parties, the insured or annuitant is dead ; Scott v. Coulson (1903) 2 Ch. 249; C. A.; Strickland v. Turner (1852) 7 Ex. 208. The cases cited above have been treated as falling under the head of common mistake, see Bell v. Lever Brothers (1932) A. C .161.
2. Kennedy v. Panama Royal Mail Co.. (1867) L. R. 2 Q. B. 580.
3. See per Scrutton, L. J. Lever Brothers Ltd. v. Bell (1931) 1 K. B. at p. 588.
4. Powell v. Horton, 2 Bing. N. C. 668 ; Woodhouse v. Swift 7 C. & P. 310.
5. S. 92, Indian Evidence Act, 1872 ; Smith v. Jeffreys, 15 M. & W. 561 ; Harnor v. Groves, 15 C. B. 667 ; Gardiner v. fray, 3 Camp. 144.
6. Produce Brokers v Olympia Oil Cake Co., (1916) 1 A. C. 314.
7. Chalmers, p. 50, citing Barr v. Gibson. (1838), 3 M. & W. 390.
8. 55 I. C. 209.
9. 22 P. L. R. 1921=59 I. C. 424=16 P. W. R. 1921.

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality ;

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Analogous law.

This section corresponds to section 14 of the English Sale of Goods Act, 1893. Sub-section (1) is based upon the judgment of Cockburn C. J. in *Biggs parkinson*[1] in which he said : "Where a buyer buys a specific article, the rule *coveat emptor* applies. but where the buyer orders goods to be supplied and trusts to the judgment of the seller to select the goods which shall be applicable for the purpose for which they are intended and which is known to both the parties, though there is no express stipulation that they shall be fit for the purpose, there is an implied warranty that they are fit for that purpose. There is no reason why such a warranty should not be implied in the case of a sale of provisions."

The principle underlying this sub-section formed the basis of section 114 of the Indian Contract Act. The proviso to sub-section (1) has re-enacted the provisions contained in section 115 of the

1 31 L. J. Exch. 301.

said Act, and sub-section (3) those of section 110 of the same, with only certain verbal changes necessitated by the adoption of sub-section (3) of section 14, of the English Act. The trend of the recent decisions does not recognise a distinction between provisions and other goods.[1] The Legislature has therefore discarded the provisions of section 111 of the Indian Contract Act, which maintained such distinction.

The proposition stated in sub-section (2) has been well established in England[2], and has also been recognised in this country[3]. Sub-section (4) is new and has been adopted from sub-section (4) of section 14 of the English Act.

Principle of *caveat emptor*—**meaning and scope of section 16.**

Section 16 deals with implied conditions as to quality or fitness of goods for a particular purpose. No distinction is drawn in the section between contracts for the sale of specific, as distinguished from those for the sale of unascertained goods. The first paragraph of the section states that subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as provided in this section. The general rule as to quality or fitness is therefore the principle of *caveat emptor* of the common law.

Rule of caveat emptor under the English law

The rule of *caveat emptor* (buyer be careful) probably owes its origin to the fact that in early times nearly all sales of goods took place in market overt, and the buyer therefore had every opportunity to satisfy himself as to the quality of the goods or their fitness for a particular purpose. The common law rules on the subject of implied condition or warranty of quality or fitness were discussed and clearly stated in *Jones* v. *Just*[4] and may be stated as follows: *Firstly*—A condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own jndgment. The buyer buys on his own judgment if he selects or defines the specific chattel of class of goods he requires, although he may state the purpose for which he is buying. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect while exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer[5]. The buyer in such a case has the opportunity of exercising his judgment upon the matter: and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. *Secondly*—Where there is a sale of a definite existing chattel specifically described, the

Everton v. Mathews, 31 L. J. Exch. 139; Smith v. Backer; 40 L. T. R.
Wallis,v. Russell, (1902) 2 L. R. 585 (611).
Jones v. Just. L. R. 3 Q. B. 197.
Peer Mohammad v. Daloo ram (1818) M. W. N. 658; Malli w Co. v. R. V. A. Firm. 43 Mad. L. J. 208.
(1868) L. R. 3 Q. B. 197; 37 L. J. Q. B. 86.
Parkinson v. Lee (1802), 2 East 314 6 R. R. 429.

actual condition of which is capable of being ascertained by either party, there is no implied warranty[1]. *Thirdly*—Where a known, described, and defined article is ordered of manufacturer although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer[2].

Exceptions to the rule of 'caveat emptor'

At common law, however, there were recognized exceptions to the rule of *caveat emptor*. *Firstly.*—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own[3]. *Secondly.*—Where a manufacturer undertakes to supply goods, manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting it is an implied term in the contract that he shall supply a merchantable article[4].

A buyer buys on the seller's judgment if the seller agrees to "supply" goods, and there is no opportunity, or no genuine opportunity, of inspecting them. If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description, his duty is to supply merchantable goods. Where the goods are bought by sample, the buyer trusts to his own judgment (having inspected or been able to inspect the sample) as regards any merchantable or other quality of the bulk which the sample would reveal on a reasonable examination, but on the seller's judgment as regards the correspondence of the bulk with the sample[5].

And at commom law generally "in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description[6]." In *Gardiner* v. *Gray*[7] the defendant made a sale of twelve bags of "waste silk." The declaration contained counts

Barr v. Gibson (1838), 3 M. & W. 390; 7 L. J. Ex. 124; 49 R. R. 650.

Chanter v. Hopkins (1838), 4 M. & W. 399; 51 R. R. 650; Ollivant v. Bayley (1843), 5 Q. B. 288; 64 R. R. 501.

Jones v. Just (1868) L. R. 3 Q. B. 1917, pp. 202-3, citing Brown v. Edgington (1841) 2 Man. & G. 279, 58 R. R. 408; Jones v. Bright (1839), 4 Bing. 533; 30 R. R. 728.

Jones v. Just supra, citing Laing v. Fidgeon (1815) 4 Camp. 169, 16 R. R. 589; Shepherd v. Pybus (1842) 3 Man. & G. 868.

See Benjamin on Sale, 7th Edn. p. 653; Mody v. Gregson (1868) L. R. 4 Ex. 49 and Drummond v. Van Ingen (1887), 12 A.C. 284; 56 L. J. Q. B. 563.

Jones v. Just, supra p. 205; citing Bigge v. Parkinson (1862) 7 H. & N. 955, 126 R. R. 783; Gardiner v. Gray (1815) 4 Camp. 144, 16 R. R. 764.

(1815) 4 Camp. 144, 16 R. R. 764 supra. The English law has been followed by the Courts in India; Peer Mohammad v. Dalooram (1918) 35 Mad. L. J. 180 (sale of black yarn Hanuman marked. The goods when shipped by the seller had been damaged by white ants). See also Malli & Co., v. R. V. A. A. Firm, A. I. R. 1923 Mad. 252=69 I. C. 396.

charging the promise to be that the silk should be of good and merchantable quality. Lord Ellenborough said:

"Under such circumstances the purchaser has a right to expect a *saleable* article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim of *caveat emptor* does not apply. He cannot, without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on dunghill".

And when it is a term of the contract that the seller should supply an article reasonably fit for the purpose for which it is required or of merchantable quality, the fact that the article is rendered unfit or unmerchantable by reason of some latent defect is no excuse to the seller. His duty on this point is absolute. It does not depend on any question of negligence, nor is it limited to making good such defects as are discoverable by care and skill[1].

The modern tendency is to narrow the scope of the rule[2].

Rule of caveat emptor under the Indian law

Exceptions to the rule of *caveat emptor* under the Act.

The Act lays down thd following exceptions to the rule of *caveat emptor*:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Sub-section (1)—relying on the seller's skill of judgment.

Sub-section (1) applies where—

(1) The buyer requires the goods for a *particular* purpose.

1 Randall v. Newson (1877) 2 Q. B. D. 102, C. A.

2 Kennedy v. Panama Co. (1867) L. R. Q. B. 587.

(2) The buyer expressly or by implication makes known to the seller that particular purpose.

(3) It is shown that the buyer relies on the seller's skill or judgment.

(4) The seller's usual *course of business is to sell* such goods whether he is the actual producer or not.

Where all these essential facts exist, there is an implied condition that the goods shall be reasonably fit for such purpose. It applies alike to the sale of specific[1] and unascertained goods; and makes no distinction between cases where the goods are *in esse* and where they are not, so that it is immaterial whether the buyer has, or has not, the opportunity of inspecting them or whether or not he avails himself of that opportunity if he has it[2]. In fact, it is a question of fact to be arrived at in each case whether the buyer did rely on the skill or judgment of the seller instead of a presumption that a buyer, who might have inspected the goods, bought on his own judgment, and an opportunity of examination and even an actual examination will be immaterial.

If the vendor is informed that an article of a certain quality or description, suited for some specified purpose is required, the law implies a promise from him that he will supply to the purchaser an article of the quality or description ordered, and reasonably fit for the purpose for which it is required. If a person purchases goods from a dealer in such goods, explaining the purpose for which they are to be used and leaving the selection of them to the seller, the latter thereby impliedly warrants that they are fit for the purpose for which they are so used, even though he was not the manufacturer of the goods sold by him[3].

The seller's liability to supply goods that are "reasonably fit" is an absolute one Consequently he is not discharged by reason that the defects in the goods are latent ones[4]; as, for instance, in the case of milk supplied by a dairy company for domestic use, where the buyer relied upon the company's skill or judgment[5].

It is not necessary that the buyer should rely on the seller's skill or judgment to the exclusion of any reliance on anything else[6].

What is a "particular purpose?"

A "particular purpose" is not some purpose necessarily distinct from a general purpose; for example, the general purpose for which all food is bought to be eaten and this would also be the particular purpose in any specific instance. A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods[7] and it may appear from the

1 See Wallis v. Russell (1902) 2 I. R 585, C. A. where this section is fully discussed. Priest v. Last (1903) 2 K. B. 148, C. A.

2 Per Palles C. B. and Andrews J. in Wallis v. Russell, supra.

3 Brown v. Edgington, 2 M & Gr. 279; 10 L. J C. P. 66; and see Bigge. v. Parkinson, 7 H. & N. 955: 31 L. J. Ex. 301.

4 See Randall v. Newson (1877), 2 Q. B. D 102; 46 L. J. Q. B. 259 (C. A.)

5 Frost v. Aylesbury Dairy Co. (1905) 1 K. B. 608; 74 L J. K. B. 386.

6 Medway Oil & Storage Co, Ltd. v. Silica Gal Corporation (1928) 33 Com. Cas. 195, H. L.

7 Wallis v. Russel. supra: Preist v. Last, supra.

very description of the article. Where, for example, the plaintiff, who was a draper, and had no special skill or knowledge with regard to hot water bottles, went to a chemist who sold such articles, and asked for a "hot water bottle" it was held that it could be justly inferred that the goods were bought and sold for the purpose of being used as a hot water bottle[1].

But where an article is capable of being applied to a variety of purposes the buyer must particularise the specific purpose he has in view, and if this is not shown, the buyer will have no remedy merely because it was unfit for the particular purpose[2].

The purpose need not necessarily appear in the contract itself, but may be proved by evidence of matters *ab extra* the contract, even when it is in writing, if such evidence does not contradict the contract. Where a contract for the sale of goods is silent as to the purpose for which they are required, the antecedent course of conduct of the buyer and seller, and the fact that a document stating the purpose for which the goods are required was brought to the knowledge of the seller, are admissible in evidence in an action for breach of warranty brought upon the contract to show that the buyer relied on the seller's skill and judgment, and that there is an implied condition that the goods shall be reasonably fit for such purpose[3].

Communication of the purpose by the buyer to the seller expressly or by implication

The second essential fact is that the buyer *expressly or by implication* makes known to the seller that particular purpose. The words "by implication" clearly indicate that the communication of the purpose to the seller need not be expressed in words. It may be inferred from the description of the goods given by the buyer to the seller, or from the circumstances of the case[2].

The particular purpose must be made known to the seller expressly or by implication. In *Bombay Burmah Trading Corporation* v. *Aga Mohammad*[4] timber was purchased and the fact was made known to the seller that the timber was to be used for railway sleepers. It was held that the buyer could reject the timber as it was not fit for the purpose.

In *re : Andrew Yule & Co.*[5] there was a contract for a sale of 150 bales of hessian cloth. The goods were resold by the buyers to sub-buyers who rejected the major portion of the goods, because of an unusual smell that rendered them unfit for packing provisions (which was one of their principal purposes). Inasmuch as the goods could be used for other purposes than packing of foodstuffs and as the buyers had not disclosed the particular purpose, it was held

Priest v. Last (1903) 2 K. B. 148 C. A. Comparo Bennet Ltd. v. Kreeger (1925) 41 T. L. R. 609 (coat with fur collar) ; Thompson v, Sears (1926) Sc, L. T. 221 (walking boots for the buyer's own use); see also Drummond v. Van Ingen, supra.

Drummond v. Van Ingen, (1887), 12 A. C. at 293 ; 56 L. J. Q. B. 563 ; Jones v. Padgett (1890), 24 Q. B. D. 650 ; 59 L. J. Q. B. 261 (C. A.) ; Bombay Burmah Corporation v. Aga Mohammad (1911) 38 I. A. 169=34 Mad. 453= 12 I. C. 443 ; In re Andrew Yule & Co. A. I. R. 1932 Cal. 879=59 Cal. 928=140 I. C 877.

3 Gillespie v. Cheney, (1896) 2 Q. B. 59; 65 L. J. Q. B, 552

4 (1911) 34 Mad. 453 (P. C.).

5 A. I. R. 1932 Cal. 879=59 Cal. 928=140 I. C. 877.

that there was no implied condition of fitness for that purpose and that the buyers could not reject the goods.

In *Griffiths* v. *Peter Conway*,[1] the plaintiff bought of the defendants a tweed coat. Soon after wearing it, she developed dermatitis and sued for damages. The court found that no normal skin would have been affected. On this finding, the court of appeal held that there was no breach of any implied condition as to fitness.

Provided the purpose is expressly disclosed to the seller, the buyer's knowledge that it may be possible that his exact requirements may not be satisfied because of the seller's want of stock, etc., will not exclude the operation of the rule enunciated in the section[2].

Where the seller knows of a general purpose but not of the special purpose contemplated by the buyer, the seller may fulfil his contract by supplying goods fit for the general purpose[3].

The buyer must rely on the seller's skill or judgment

It is not enough that the buyer communicates the purpose for which he wants the goods but he must rely upon the seller's skill or judgment. But the buyer is expected to exercise his own judgment or common sense ; and examination of the goods by the buyer may afford evidence that he did not rely altogether on the seller's skill and judgment. In *Wallis* v. *Russel*[4], where 'two fresh crabs for tea' were required and the plaintiff saw the goods, it was yet held that the plaintiff relied on the defendant to select crabs which would be nice and fresh for tea and so the defendant was liable. The fact that the defects are latent is no excuse where the seller's judgment is relied on[5].

The case is similar where the buyer actually selects the goods he requires[6]. If the seller's skill is in fact relied upon, it is immaterial whether the defect in the goods is such as could be discovered by the exercise of ordinary skill or judgment or not[7]. As already observed[8], the question whether a buyer has bought relying on his own judgment or not is a question of fact in each case, and an opportunity of examination and even an actual examination are immaterial. It is also not necessary for the application of this rule that the buyer must have *exclusively*

(1939) 1 A. E. R. 685. See also Exporters Ltd. v. Allen & Sons (1938) 3 A. E. R. 375 (operation of clause restricting right of rejection) ; Wilensko v. Fenwick, (1938) 3 A. E. R. 429.

Manchester Liners v. Rea (1922) 2 A. C. 74 (order for coal for particular steamer with natural draught furnaces —buyer's knowledge of limited supplies—coal actually supplied unsuited —buyer held entitled to damages),

Jones v. Padgelt (1890) 24 Q. B. D. 650 (order for "indigo blue cloth" by a wool merchant who was also a tailor—cloth wanted for liveries—goods unfit for that purpose, but otherwise merchantable).

4 (1902) 2 Ir. Rep. 585, C. A.

5 See Frost v. Aylesbury Dairy Co., supra ; Mac Farlane v. Taylor, (1868) 1 Sc. Ap. 245 ; Mackillop v. Noorbhoy, A. I. R 1929 Sind 161=116 I. C. 588.

6 Wilson v. Dunville (1879) 4 L. R. Ir. 249 ; Robertson v. Amazon Tug Co., (1881) 7 Q. B. D. 598, C. A.

7 Frost v. Aylesbury Dairy Co., supra.

8 See page supra.

relied on the seller's judgment alone so long as he does so to a substantial extent[1].

The above three points are illustrated in a Calcutta case reported as *Joseph Mayr* v. *Phani Bhushan*[2]. In this case the plaintiff who carried on a business of ink and sealing wax wished to start the manufacture of carbon paper. He consulted from time to time the defendant, a manufacturer's agent, who advised him to use a steam boiler. The parties for some years previous to that had business dealings with each other, and the defendant even purchased some formulae for the plaintiff for the preparation of the carbon paper. The idea originally was to warm the rollers with gas flames. Sometime in 1933 the plaintiff discussed the mater with the defendant and was advised by him that the better way would be to heat the rollers with steam.

Plaintiff placed the order for the same with the defendant and having made known the purpose for which it was required relied upon the skill and judgment to supply him with a boiler which was reasonably fit for the purpose. The boiler was accordingly delivered to the plaintiff who installed it in his workshop in 1933. It was, however, discovered in 1934 by the boiler inspecting authorities that the boiler did not satisfy the requirements of the Indian Boilers Act and was therefore discarded. Plaintiff purchased another boiler in 1937.

Held, that the defendant was guilty of breach of contract as the boiler was not reasonably fit for the purpose for which it was ordered and supplied and the plaintiff was, therefore, entitled to claim damages from the defendants under the following heads : (1) Expense incurred in removing the boiler in question and in installing another suitable one ; (2) the difference between the price of another boiler suitable for the purpose which could be bought when the boiler was discarded in 1934 and the price he could get by the sale of the unusable boiler at the same time in 1934, and (3) a sum of money estimated to be the overhead charges in respect of the carbon paper plant only, during the time necessarily taken up in removing the unusable boiler and installing a suitable one.

It was observed in this case :

"The boiler was delivered on 20th October and was paid for finally nearly two months later. It was erected and kept erected until sometime in April following when the plaintiff purported to reject it. In my view he had kept it too long to be in a position to be able in law to reject it. He must be deemed to have accepted it, and if he has a remedy against the defendant for breach of contract that remedy is one not of rejection but for damages."

If the goods are to be manufactured according to the buyer's plan, the buyer relies upon his own judgment[3]. Where the special purpose is disclosed to the seller, such disclosure is normally sufficient to show that the buyer relies upon the seller's skill[4] but

1 Medway Oil & Storage Co. v. Silica Gal Corporation. (1928) 33 Com. Cas. 195 ; Carmell Laird & Co. Ltd. v. Manganese Bronze and Brass Co. Ltd., (1934) A. C. 402.

2 A. I. R. 1939 Cal. 210=I. L. R. (1938) 2 Cal. 88.

3 Hall v. Burke (1886), 3 T. L. R. 165, C. A., per Lord Esher, M. R.

4 See Manchester Liners, Ltd. v. Rea, Ltd. (1922) 2 A. C. 74.

generally no condition or warranty of fitness is implied where the buyer, although he may state his purpose, selects the goods he requires[1].

Seller must deal in goods of the kind sold

It is essential for the application of sub-section (1) that the seller supplies goods of the description sold in the ordinary course of his business. If the seller does not deal in the class of things sold, the buyer plainly buys on his own judgment. Thus in *Turner* v. *Mucklow*[2] where the buyer, who had ordered "spent madder", which was merely the refuse product of the seller's manufacture, and was sold as such, intending out of it to produce garancine, which it failed to produce, was held bound to take the risk of the goods producing the desired result.

It is immaterial whether the seller is a manufacturer or producer or not. In *Parkinson* v. *Lee*[3] it was held that the seller, who was only a dealer, and not the manufacturer, was not liable for a latent defect which could not be discovered on an examination of the sample. This decision was, however, criticised in a later English case[4]. Section 16 (1) draws no distinction between a manufacturer and a dealer who is not one, Under it the seller's liability is in his character of dealer, though he may be also the manufacturer or the producer[5].

In *Camell Laird & Co.* v. *Manganese Bronze & Brass Co.*,[6] where an order was placed for the manufacture of a propeller for a ship according to plans and dimensions supplied by the purchaser and the propeller when fitted in, made a great noise, it was held that the warranty of fitness was broken and that the buyer was entitled to reject the same.

The same principle applies in the case of a contract for work and labour. In *G. H. Myers & Co.* v. *Brent Cross Service Co.*[7] the plaintiffs entrusted a motor car for repair to the defendants, who were garage proprietors and repairers of motor cars. In the course of repairing the car, the defendants obtained from the makers of the car and fitted six new connecting rods. One of these rods had a latent defect, which the defendants could not by reasonable care or skill have discovered and it broke, causing extensive damage to the engine. In an action for damages from the defendants, *held*, that the warranty implied in a contract for work done and materials supplied as to the fitness of the materials was not less than that implied in a contract for sale of goods—namely an absolute warranty of fitness. But that warranty might be excluded if it appeared that the person giving the order did so in such a form as to show that he did not rely on the contractor's skill and judgment. Where the seller was not a dealer in meat, and the thing bought turned out to be unfit for

1 Wilson v. Dunville (1879), 4 L. R. Ir. 249; Turner v. Muckbow (1862), 8 Jur. (N. S.) 870; Fitzgerald v. Iveson (1858), 1 F. & F. 410; Robertson v. Amazon Tug and Lighterage Co. (1881), 7 Q. B. D. 598 C. A.; Halsbury, Law of England, 2nd Edn. Vol. XXIX p. 64.

2 (1862), 8 Jur. (N. S.) 870; 131 R. R. 800.

3 (1802) 2 East, 314; 6 R. R. 429.

4 Randall. v. Newson (1877) 2 Q. B. D. 102, at p. 106, defect in a carriage pole which would not be disclosed on examination.

5 See Wallis v. Russel, supra.

6 (1934) A. C. 402.

7 (1934) 1 K. B. 46.

food; he was held not liable, as the buyer did not rely on the seller's judgment[1].

The words "or producer," do not appear in S. 14 of the English Act. They have been added in the present section so as to include agricultural produce specifically[2].

Illustrations

The following further illustrations may be studied with advantage :—

(1) Sale of pigs with all faults" in a market. The pigs were suffering from typhoid fever and infected other pigs belonging to the buyer. In the absence of fraud on the part of the seller, the buyer was without remedy[3].

(2) In *Jackson* v. *Watson & Sons*[4] there was a sale by a grocer and provision merchant of tinned salmon. The buyer was made ill by the salmon, which was poisonous, and his wife who also ate it died from the effects of the poison. The buyer recovered damages including a sum to compensate him for being compelled to hire some one to perform the service which had been rendered by his wife.

(3) *Manchester Liners, Ltd.* v. *Rea, Ltd.*[5] related to an order for 500 tons South Wales coal, for the steamship "Manchester Importer" at Partington. The buyer knew when he gave the order that the seller's sources of supply were limited and might be procurable from the cargo of one particular vessel only. The order was accepted but the coal supplied, which came from the cargo of that vessel, was unsuitable for burning in the "Manchester Importer" which had natural draught furnaces, with the result that she had to abandon her voyage and return to port. The buyer recovered damages.

(4) In *Jones* v. *Bright*[6] there was a sale of copper for the purpose, known to the seller, of sheathing a ship. Owing to a latent defect the copper perished in a few months and was in fact unfit for the purpose of sheathing a ship. The buyer was held entitled to recover damages.

(5) In *Gedding* v. *Marsh*[7], where a manufacturer of mineral waters supplied the plaintiff with mineral water in bottles for sale in her shop, the bottles being returnable when empty, and, while the plaintiff was replacing a bottle in its case, the bottle, being defective, burst, it was held that the bottles, though returnable, were "supplied under a contract of sale" within section 14 (of the English Act) and therefore there was an implied warranty that the bottles should be reasonably fit for the purpose for which they were supplied.

(6) There was a sale by sample by a woollen manufacturer of indigo cloth to a woollen merchant who was also a tailor. The buyer required it for the purpose of making it into liveries, but this was not made known to the seller in any way. Owing to a latent

1 Burnby v. Bollett, (1847) 16 M. & W. 644 ; 73 R. R. 667 (sale of a pig).
2 See also notes at pages 35 to 38.
3 Ward v. Hobbs (1878) 4 App. Cas. 13.
4 (1909) 2 K. B. 193, C. A.
5 (1922) 2 A. C 74.
6 (1829) 5 Bing. 533.
7 (1920) 1 K. B. 668 ; 89 L. J. R, B, 526.

defect in the cloth (which was also in the sample) it was unfit for that purpose, but there was nothing to show that it was unfit for other purposes for which cloth of that kind might be used. The buyer was without remedy[1].

(7) A tells B that he can supply him with bunkering coal to suit his steamers. B says he will give an order, but that the order must come through L, the coal merchant with whom he deals. This conversation is repeated to L who gives the order. If coal unfit for bunkering is supplied and rejected, A cannot sue for the price[2].

(8) B buys a bath bun at a baker and confectioner's shop. The bun contains a stone on which B breaks one of his teeth. The seller (it seems) is liable for a breach of warranty under sub-section (1), and also to an action for negligence[3].

Provisions

(9) Chalmers observes[4] : "It was formerly thought that where provisions were sold by a dealer in provisions there was always an implied condition or warranty that they were fit for food[5], but it was afterwards held that there was no distinction between provisions and any other goods. For instance, if a man selected and bought a carcase in the market he took it at his own risk[6]. Under the Act the question is whose judgment was relied on in making the purchase This is a question of fact and "the section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else[7]."

Fitness for a particular purpose

(10) This phrase has been construed to mean *intrinsic* fitness for the particular object to which the goods are to be applied and not fitness having regard to some particular legislation or rules framed by the State. Consequently on a sale of machinery or plant the mere fact that the licensing authority declines to issue a licence, in respect of it may not *ipso facto* be a breach of the warranty of fitness, though it may raise a presumption that the goods are not fit[8].

(11) When goods are ordered of a manufacturer to be made for a particular purpose. the buyer does not the less rely upon the seller's skill or judgment by reason only that the buyer supports alterations in the mode of manufacture, or the use of particular materials, if such alterations or materials, even where they are the cause of the unfitness, are adopted without objection by the manufacturer[9]. But where it is part of the contract that the goods shall be made according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose

1. Jones v. Padgett (1890) 24 Q. B. D. 650.
2. Crichton v. Love (1908), 10 F. 818, Court of Session.
3. Chaproniere v. Mason (1905), 21 Times' L. R. 633, C. A. (verdict for defendant set aside and new trial ordered).
4. Sale of Goods Act, 1893, 11th Edn., p. 55.
5. Wallis v. Russell, (1902) 2 Ir. Rep. 585, at p. 611, C. A.
6. Emmerton v. Matthews (1862), 7 H. & N. 586 ; Smith v. Baker (1878), 40 L. T. (N. S.) 261. But as to provisions bought by description, see Bigge v. Parkinson. (1862), 7 H. & N. 955. See the whole question discussed in Wallis v. Russell, supra.
7. Medway Oil and Storage Co. Ltd. v. Silica Gel. Corp. (1928), 33 Com. Cas. 195.
8. Joseph Mayr v. Phani Bhushan A. I. R. 1939 Cal. 216=(1938) 2 Cal. 89.
9. Hall v. Burke (1886) 3 T. L. R. 165 (C. A.)

contemplated. The only liability then of the manufacturer is to execute the work according to the plan etc, and in a workmanlike manner and to exercise due care and skill in the selection and testing of the materials in the absence of an express engagement on his part to produce goods which will be adopted to the buyer's purpose[1].

According to S. 16 (1) there is an implied condition that the goods should be reasonably fit for the particular purpose for which they are required and a purchaser. if he does not find the goods to be reasonably fit for the purpose for which they are required, is legally entitled to reject them[2].

Sale of an article under its patent or trade name—proviso to sub-section (1).

This corresponds to the repealed section 115 of the Indian Contract Act. The principle of it was expressed thus in *Bristol Tramways* v. *Fiat Motors Ltd.*,[3] by Farwell, L. J. :—

"If a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it even although he told the vendor before he ordered it the purpose for which he required it."

The corresponding proviso in section 14 of the English Act was based on the decision in *Chanter* v. *Hopkins*[4]. In that case the plaintiff was the patentee of a furnace and stove having an apparatus constructed to consume its own smoke. The defendant, a brewer, wrote to him : "Send me your patent hopper and apparatus to fit up by brewing copper with your smoke-consuming furnace." The furnace and apparatus were sent, and proved a failure in defendant's brewery. From the very terms of the order and from conversations with the defendant the plaintiff knew that the apparatus was to be used in a brewery. *Held*, that, though the machine had failed in its object, the plaintiff could recover the price of it having supplied what was ordered. Parke, B, said : "The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine."

As already observed[5], where a buyer defines the specific article or the class of goods he requires to fulfil his purpose, he buys on his own judgment, although he communicates to the seller the particular purpose for which he wants the goods, and he must take the risk of their adaptability. In such a case the buyer's purpose is not an essential element of the sale, but is merely his motive in purchasing. This principle has been specially adopted by the Act, with regard to a limited class of goods [though it underlies the general provisions of section 16 (1)], in the proviso to section 16 (1)[6].

The proviso does not cover the case of an executory contract for the supply in bulk of manufactured goods, such as coal, though

1 Benjamin on Sale 7th Edn. pp. 662, 663 adopted in Cammel Laird Co. Ltd. v. Mangenèse Bronze Co. Ltd., (1933) 2 K. B. 141.
2 Baretto v. Pruce, A.I.R. 1939 Nag. 19.
3 (1910) 2 K. B. 831 (Cf.) Gillespie v. Cheney, (1896) 2 Q. B. 59 (sale of coals under a particular known description—not a case of sale of article under its patent or trade name).
4 (1838) 150 E. R. 1484 ; 51 R. R. 650.
5 See page supra.
6 See Benjamin on Sale, 7th Edn., p. 663.

the terms of the contract may require them to be of a description known in the trade[1]. " It is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs or any form of invention which has a known name, and if bought and sold under its known name, patented or otherwise."

Explaining the scope of the proviso, Farwell L. J. observed in *Bristol Tramways, etc., Co.* v. *Fiat Motors*[2] : Trade name

"This must, in my opinion, be confined to articles which have in fact a patent or trade name under which they can be ordered. By A's patent shaving machine I mean a known article dealt in under that name. It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade, it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that company might adopt patterns and devices which were its own exclusive property : the former is within the proviso, the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act ; if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. *A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case.*"

And it does not necessarily follow that, because the contract is for the sale of a specific article under its patent or other trade name, even when that name has been acquired by user, there is no implied condition as to its fitness for any particular purpose. For although a person may order an article under a patent or trade name within the meaning of the proviso. yet if at the same time that the order is given he makes it clear to the seller that he is relying on the seller's skill and judgment to insure that the article shall be fit for the particular purpose, the proviso has no application, and the buyer is entitled to the benefit of the provisions of sub-section (1)[3]. In that case (*Baldrey* v. *Marshall*) the plaintiff applied to the defendants for a motor car suitable for touring. The defendants said that the Bugalti car, their speciality, would suit, and showed the plaintiff a specimen. The plaintiff then ordered an "eight-cylinder Bugalti car." The car delivered proved to be unsuitable for touring purposes, and the plaintiff claimed to reject the car and recover back the purchase money. *Held*, that he could do so. The mere fact that the car was sold under its trade name did not necessarily bring the case within the proviso to section 14 (1) so as to exclude the implication of the condition of fitness. Bankes, L. J. stated the test thus : "Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying an the skill or judgment of the seller, however great that skill or judgment may be ?" And he put three cases : (1) Where the buyer asks for an article for his purpose and the seller supplies one having a trade name ; (2) where the buyer says, " I have been recommended such a trade-name article. Will it suit ?—in these cases the proviso does not apply : (3) Where the buyer says, " I have been recommended such an article as suitable ......Please send it "—in this case the proviso applies.

1 Gillespie Brothers & Co. v. Cheney Eggar & Co., (1896) 2 Q. B. 59.

2 (1910) 2 K. B. 831 ; 79 L. J. K. B. 1107 (C. A.)

3 Baldrey v. Marshall, (1925) 1 K. B. 260 ; 94 L. J. K. B. 192 (C. A.)

There may, of course, be an express engagement by the seller to supply a patent article to be fit for the buyer's purpose[1].

The terms of the proviso show that it does not apply except to the patent or trade article *itself*. A condition of the fitness of articles supplied which are necessary to the use of the patent article, may sometimes be implied. Thus where the patentee of a particular gas installed a gas plant, but miscalculated the size of the plant, so that the lighting and heating was wholly insufficient in quantity, but there was no failure in the quality of the gas itself, it was held that a condition should be implied as to the fitness of the plant, and the proviso to section 14 (1) of the English Act [corresponding to section 16 (1) of the Indian Act] did not apply[2].

The condition or warranty as to fitness is not, of course, implied in favour of a third person not a party to the contract of sale, between whom and the seller there is no privity of contract. To render the seller responsible to a third person, the latter must show either fraud on the part of the seller, or a duty to him to take care that the thing sold is fit[3].

The second exception—sub-section (2)—merchantableness.

Sub-section (2) embodies the second exception recognized at common law to the maxim *caveat emptor*. It lays down that where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. If, however, the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. Thus whereas at common law the implication of a condition that the goods were of merchantable quality did not arise if the buyer had an opportunity to examine the goods, under this section it will only be negatived if the buyer has actually examined the goods. Again, under the Act the seller is liable for latent defects which rendered the goods unmerchantable, even if the goods are examined by the buyer, although at common law it was at least doubtful if the seller was so liable.

The rule laid down in this sub-section is thus reduced to this: In the case of goods sold by description by a seller who deals in such goods, he is always, *in the absence of agreement to the contrary*, responsible, for latent defects in the goods which render them unmerchantable, whether the buyer has examined them or not, and for all such defects whether latent or discoverable on examination in cases where the buyer has not in fact examined the goods. Where the buyer gets opportunity of inspection but examines the goods superficially, he cannot complain of defects which reasonable and more thorough examination ought to have revealed[4].

It is to be remembered that the proviso to sub-section (1) does not apply to this sub-section, and the implied condition as to merchantableness applies to all goods bought from a seller who deals

1 See Benjamin on Sale, 7th Edn., p. 665 and the cases cited thereunder.

2 Paterson v. Newman (1908), 28 N. Z. L. R. 218.

3 See Benjamin on Sale, 7th Edn., p. 666 and the authorities cited therein.

4 Thornett & Fehr v. Beers & Son (1919) 1 K. B. 486 ; 88 L. J. K. B. 684.

in goods of that description, whether they are sold under a patent or trade name or otherwise[1].

As to when goods are said to be bought by description, see notes to section 15, *ante*. The "quality" of goods includes their state or condition[2].

Merchantable quality

The term "merchantable" has not been defined in the Act. Goods are of merchantable quality if they are of such quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of the offer to buy them, whether he buys for his own use or to sell again[3].

"Merchantable quality" does not cover legal title to goods or the legal right to sell. In *Summer. Permani & Co.* v. *Webb*[4] the defendants sold tonic water to be shipped, as they knew, to the Argentine. The water contained salicylic acid. Argentine law prohibited the sale of food or drink containing that acid, and the tonic water was condemned on arrival. *Held*, that the fact that by the local law the goods were unsaleable in the country in which the defendants knew that they were to be sold was not a breach of the implied condition that they should be of merchantable quality." "Merchantable quality" means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be good tender. It does not mean that there shall in fact be persons ready to buy the goods .. I do not think "merchantable quality" means that there can legally be buyers of that article. If the goods are of the contract description the possibility of legally making a sale of them does not in my view come within the expression "merchantable quality."

Latent defects and patent defects—distinction

Under section 16 (2) and the proviso thereto, in the case of a sale by description, the implied condition extends to merchantability less patent defects. The defects contemplated by section 16 (2) are those "apparent on reasonable examination" within the meaning of section 17 of the Act. The implied warranty will be excluded only as regards any defects which a buyer of ordinary diligence and experience would have detected by due diligence, in the use of all ordinary and usual means. If merchant possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden defect as distinguished from a patent defect and for such a latent defect, the seller is liable under the section (1).

A contract for the sale of certain skins provided *inter alia* that the skins were " to be of fair average quality " of description and to be passed by Messrs. Gordon Woodroffe & Co. Ltd.,[5] Madras

1 Bristol Tramways Co. v. Fiat Motors, Ltd., (1910) 2 K. B. 831. C. A.
2 See section 2 (12) ante.
3 Per Farwell, L.J. in Bristol Tramways, etc. Co. v. Fiat Motors, (1910) 2 K. B. 831, at 841; 79 L J. K. B. 1107 (C. A.), Morelli v. Fitch and Gibbons. (1928) 2 K. B. 636; 97 L. J. K. B. 812. (defective bottle of ginger beer).
(1922) 1 K. B. 55; 91 L J. K. B. 228 (C. A.)
A. M. N. Khoyee & Co. v. Gordon Woodroffe & Co., A. I.R. 1937 Mad. 40=1 L R. (1937) Mad. 497=166 I. C. 313.

(buyers) as such. The goods were inspected, approved and accepted. The goods were then sent to England ; but when they were put to work, it was found that there were defects in the skins, which were not revealed on examination of the skins in the dry salted state. In a suit by the sellers for the price of the skins, the buyers counter-claimed for damages on the ground that the goods supplied did not fulfil the description in the contract.

Held (1) that the sale being one by description governed by section 16 of the Act, there was an implied condition as to the quality of the goods ; that the fact that the goods had been passed by the buyers did not end the matter, and that the superadding of the provision as to inspection did not reduce the importance of the independent undertaking as to quality; (2) that the defects discovered being latent and not patent defects, the sellers were liable for the same; (3) that the express condition in the contract that the skins " are to be of fair average quality," gave the buyers a higher right, apart from the implied condition under section 16 (2), that the buyers might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although they would be precluded from rejecting the goods ; (4) and the buyers having accepted the goods were entitled in the suit by the sellers for price of the skins to counter-claim for damages[1].

The buyer is not entitled to treat the goods as unmerchantable merely because they are not fit for some particular purpose; for if goods are sold under a description which they fulfil and if goods under that description are reasonably capable in ordinary use of several purposes, they are of merchantable quality within the meaning of the sub-section if they are reasonably capable of being used for any one or more of such purposes, even if unfit for that one of those purposes which the particular buyer intended[2].

Thus, where barley, sold under the description of feeding barley, was found to be useless as food for pigs, owing to its having beenn attacked by a fungus, but was still capable of being used as feeding stuff for other animals, it was held that it was not unmerchantable[3].

Goods which can be made merchantable

Goods are not merchantable merely because they can be *made* merchantable at small expense. They must, as a whole (subject to the rule of *de minimis non curat lex*), be merchantable at the time of the seller's tender. Thus in the case of *Jackson* v. *Rotax Motor & Cycle Co.*,[4] there was a sale of a quantity of motor horns by instalments. The first instalment was accepted, but the second contained a substantial portion of horns which owing to bad packing were dented, while others were owing to careless workmanship badly polished, and by reason of these defects they were not saleable. The buyer was held entitled to reject the whole lot, although it would have cost but little to repair the dents, and to polish the horns properly.

1. A. M. N. Khoyee & Co. v. Gordon Woodroffe & Co., A. I. R. 1937 Mad. 40=I. L. R. (1937) Mad. 479=166 I. C. 313.
2. Canada Atlantic Grain Export Co. v. Eilers (1929) 35 Com. Cas. 90, at p. 102 ; In re Andrew Yule & Co. A. I. R. 1932 Cal. 879.
3. Ibid ; see also Jones v. Padgett, supra.
4. (1910) 2 K. B. 937, C. A.

The following further examples by way of illustrations* may be studied with advantage :— **Further illustrations**

(1) Sale of certain "bales Manilla hemp," expected to arrive on ships named. The vessels arrived, and the hemp was delivered damaged, so as to be unmerchantable, but being still properly described as Manilla hemp. *Held*, that the seller was liable and the buyer was entitled to recover the difference between what it fetched on being resold with all faults and what it would have been worth if it had been shipped in proper condition. In everv contract to supply goods of a specified description, which the buyer has had no opportunity to inspect, the goods must not only answer the description, but must be saleable or *merchantable* under that description[1].

(2) In *Thornett & Fehr* v. *Beers & Son*[2] where the buyer's agents though offered every facility of inspecting the barrels of glue inspected the outside only, Bray J. held that the buyer having partly relied on the description had bought the glue "by description" and must be held to have examined it. They were satisfied by their inspection of the barrels, which, if opened, would have shown the condition of the glue. Moreover, under the Act a full examination was not necessary. Accordingly, no condition of merchantable quality could be implied.

(3) In *Peer Mohammad* v. *Daloorani*[3] where black yarn was purchased and the same was found damaged by white ants, it was held that the condition regarding merchantability was broken.

(4) In *Malli & Co.* v. *R. V. A. Firm*[4] where out of a bale of 1,000 pieces 9/10 was found to be damaged (moth eaten), it was held to be a breach of a condition. Similarly, where cement was damaged by sea water[5], or beer contaminated with arsenic[6], or dates contaminated with sewage[7] the condition as to merchantability was held to have been broken.

(5) In *Grenfell* v. *Meyrowity Ltd.*[8] the plaintiff purchased in 1932 flying goggles gescribed as fitted with "safety glass lenses." In 1935 he was involved in an accident in which he suffered *inter alia* an injury due to a splinter from the goggles entering the eye. The evidence was that the glasses supplied was known in the market in 1932 as "safety glass lenses." It was held that there was no warranty of absolute safety and that the plaintiff got what he purported to buy and there was no evidence of unmerchantability.

(6) In the case of sale of tyres by a person who is the distributor of Continental Solid tyres, and those tyres only, there is no implied condition as to the fitness of the tyres for any particular purpose, though the goods sold must be of merchantable quality[9].

Where purchase is made of *kaithal* ghee and sold as *kaithal* ghee and which is *kaithal* ghee, S. 16 (2) of the Act applies and

1 Jones v. Just, L. R. 3 Q. B. 197 ; 37 L. J. Q. B. 89.
2 (1919) 1 K. B. 486.
3 47 I. C. 555=(1918) 35 M. L. J. 180.
4 A. I. R. 1923 Mad. 252=69 I. C. 396.
5 Montreal Light, Heat & Power Co. v. Sedgwick (1910) A. C. 598.
6 Wren v. Holt (1903) 1 K. B. 610. Asfar & Co. v. Blundell (1896) 1 Q. B. 123.
8 (1936) 2 A. E. R. 1313.
9 Globe Automobile Co. v. K. A. K. Master, 157 I. C. 12=8 R. R. 81, *

there is only an implied condition that the goods sold shall be of merchantable quality and not that it should be pure ghee.[1]

Section 16 (2) applies to specific goods.

It will be observed that there are no words in section 16 (2) to confine its operation to unascertained or future goods; indeed, the fact that the sub-section contemplates the possibility of the goods having been actually examined shows that specific goods are not excluded[2]. In *Wren* v. *Holt*[3], the plaintiff entered a public-house, licensed for the sale of beer to be consumed on the premises, knowing that all the beer sold at that house was supplied from H's brewery and with the object of getting H's beer because he preferred it. He, however, only asked for beer generally. The beer supplied contained latent quantities of arsenic, which made the plaintiff ill. The jury found that the plaintiff did not rely on the befendant's skill or judgment under section 14 (1) of the English Act. It was held by the Court of Appeal that judgment had been rightly entered for the plaintiff, on the ground that he had bought goods from a seller who dealt in goods of that description, and that there was an implied condition that they should be of merchantable quality.

The sub-section applies only to specific goods sold by description and not otherwise.

Condition or warranty implied from usage—sub-section (3).

This sub-section contains the same rule as that embodied in old section 110 of the Indian Contract Act, and is based on the decision in *Jones* v. *Bowden*[4]. In that case there was an action for breach of a warranty of quality. It was shown that in auction sales of certain drugs, as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. Fair samples had been shown, but sea-damage could not be datected by examination. The court held, on this evidence, that freedom from sea-damage was an implied warranty in the sale.

Section 62, *post*, provides for the converse case of an implied condition or warranty being excluded by usage, if the usage is binding on both parties to the contract.

It was held in *Bombay United Merchants' Co.* v. *Doolubram*[5] that an importing firm which accepts a commission to order out goods from Europe at a specified rate, and undertakes that the goods will be invoiced to the indenter at that rate, does not, in the absence of proof of usage to the contrary, fulfil its contract by offering to the

1 Madhusudan Das v. Ram Kishun Das 1943 A. L. W. 325.

2 Benjamin on Sale, 7th Edn., p. 670.

3 (1903) 1 K. B. 610; cf. Morelli v. Fitch & Gibbons (1928) 2 K. B. 636; Gedding v. Marsh (1920) 1 K. B. 668, which show that the conditions under sub-sections (1) and (2) apply not only to the goods sold, but also to goods that are essentially necessary to the delivery and use of the goods sold, as being "supplied under the contract of sale."

4 (1903) 1 K. B. 610, 615: see also Syers v. Jones, 2 Ex. 111; 74 R. R. 515.

5 (1887) 12 Bom. 50.

indentor goods procured in Bombay from another firm in Bombay, though they answer the description of the goods in the order.

See further notes under section 62.

Effect of express condition or warranty on those implied—sub-section (4).

This sub-section lays down that 'an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.' In *Bigge* v. *Parkinson*[1] the defendant had made a written offer "to supply your ship, *The Queen Victoria*, to Bombay, with troop stores, *viz.*, dietary, mess, utensils, coals, etc., at £6 15s. 6d. per head, guaranteed to pass survey of the Honourable East India Company's offices, and also guarantee the quantities (qualities) as per invoice." The plaintiff accepted this offer. In an action by the plaintiff against the defendant for supplying stores not reasonably fit for consumption by the troops, it was contended by the defendant that the express condition in the contract excluded any implied condition; but this was overruled, the court holding it to be an express condition annexed to that ordinarily implied for the benefit of the buyer to guard himself against any rejection of the goods by the officers of the East India Company, but that it would be otherwise if it could be gathered from the contract that the provisions were to be supplied to the satisfaction of the East India Company's officers, *so that they were to be the sole judges* whether the provisions were fit for the purpose intended, for such a condition would be inconsistent with the absolute condition as to fitness implied by law.

In the case of a sale of a horse, where the buyer insisted upon a veterinary doctor's certificate and the seller furnished one, it was still liable for breach of warranty as to the soundness of the horse[2].

Where there is an express sale by sample the implied condition of merchantable quality is not excluded with regard to latent defects[3].

An express term, however, will not be extended by implication[4], and if it be inconsistent with a term implied by law it will prevail and the term usually implied will be negatived.

Cf. section 62 *post*, which provides that an implied warranty or condition may be negatived or varied by express agreement.

Hire-purchase arrangement—breach of warranty of fitness.

At the time of a supposed purchase the purchaser entered into a hire purchase agreement of quite a common kind with a finance company. The document recorded the relationship of hire-purchase between the hirer and the owner in the form of an

1 7 H. & N. 955 ; 31 L. J. Ex. 301.
2 O'Grady v. Herbert Winn (1912) 9 A. L. J. 285=14 I. C. 135.
3 Drummond v. Van Ingen (1887) 12 App. Cas. 284 ; see also Mody v. Gregson, (1868) L. R. 4 Exch. 49, at p. 53 ; Baldry v. Marshal,l supra, Compare Wallis v. Pratt (1911) A. C. 394.
4 Dickson v. Zizinia (1851) 10 C. B. 602, 84 R. R. 719.

offer made by the hirer on a printed form signed by the hirer on may 11, 1938. On the same date a document purporting to be an invoice was signed by the dealer purporting to invoice the apparatus to the hirer. In an action by the hirer against the dealer alleging a breach of warranty of fitness of the apparatus it was contended that the transaction was a sale and not of hire and that the defendant was liable as vendor for the breach of the warranty. *Held*, that the contract was one of hire purchase and the issue of the invoice did not make it one of sale and the action must fail[1]

Sale by sample

*17. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition—

(a) that the bulk shall correspond with the sample in quality;

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Sale by sample.

Before the passing of the English Sale of Goods Act, 1893, it was held that on a sale by sample the only warranty was that the sample was fairly taken from the bulk[2]. The purchaser suing for damages on the ground that the bulk did not correspond with the sample had then to establish either a warranty or a false and fraudulent representation that the bulk was equal to the sample. If he relied on an implied warranty, the implication had to be based on facts other than the mere exhibition of the sample. If he relied on a misrepresentation, he had to prove that it was false to the knowledge of the vendor[3]. It was formerly a question in each case whether the term that the goods should correspond with the sample was a condition entitling the purchaser in breach of it to rescind the contract, or merely a warranty giving him a right of action for damages; and on the sale of specific chattels the letter construction prevailed[4]. Abbot C. J. observed in *Parker* v. *Palmer*[5]: "The

1 Drury v. Buckland, Ltd. (1941) 1 All. E. R. 269 (C. A.).

* **Analogous law.**

Section 15 of the English Sale of Goods Act, 1893, which is the same as section 17 of the Indian Act.

Old section 112 of the Indian Contract Act, 1872, which ran as follows:—

"On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample."

2 Sayers v. London and Birmingham Fluit Glass Co., 27 L. J. Ex. 294.

3 Ormrod v. Huh, 14 M. & W. 651: 14 L. J. Ex. 306; Freeman v. Baker, 3 L. J. K. B. 17; Moens v. Heyworth, 10 L. J. Ex. 177.

4 Heyworth v. Hutchinson, 36 L. J. Q B. 270.

5 (1821) 4 B. & A. 387; 23 R. R. 318.

words 'per sample' introduced into this contract, may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the rule," and that as a general rule "the purchaser may reject the commodity if it does not correspond with the sample", but, as in other like cases, not after he has occupied the goods or dealt with them as his own[1]. Again, at common law it was held that the buyer is entitled to reasonable facilities for inspecting the bulk independently of any local or trade usage to that effect[2] and if there is any latent defect in the sample which, if present in the bulk, would render the goods unmerchantable, the sample is to be taken as if free from it[3]. The same result is now arrived at through the combined operation of sections 15 (2) *(a)* and 11 (*c*) of the Act of 1893 [corresponding to sections 17 (2) (*a*) and 13 (2) of the Indian Act].

"Sale by sample", should be distinguished from "sale by sample as well as by description", in which case it is not sufficient that the bulk of goods corresponds with the sample if the goods do not correspond with the description[4]. The sample in such cases is looked upon as a mere expression of the quality of the article, not of its essential character. In *Nichol* v. *Godts*[5], there was sale of foreign refined rape-oil warranted only equal to sample. The oil tendered was the same as the sample but it was not "foreign refined rape-oil" being a mixture of it and another oil. It was held that the seller was liable.[4]

If a sample is exhibited at the time of the contract, a question may arise whether the description or the sample was intended to be essential. The latter case is not strictly speaking a sale by sample within the Act, and it is sufficient if the goods correspond with the sample ; in the former case they must answer the description as well[5]. The question which of the two was to be "the touchstone of the contract" depends on the intention and object of the parties issuing the sample[6]. Generally the description is the more important, as it goes to the nature of the goods, whilst the sample deals more with the quality[7]. Evidence is abmissible to prove that the sale was by sample though the contract is written and is silent about it[8].

Section 17 (2) now provides that in the case of a contract for sale by sample there is an implied condition—

(*a*) that the bulk shall correspond with the sample in quality :

1 (1821) 4 B. & A. 387 ; 23 R. R. 313.
2 Lorymer v. Smith (1822) 1 B & C. 1 ; Polenghi v. Dried Milk Co. (1904) 10 Com. Cas. 42 ; E. Clemens Horst Co. v. Biddell Brothers (1912) A. C. 18.
3 Heilbutt v. Hickson (1872) L. R. 7 C. P. 438.
4 See also Josling v. Kingsford (1863) 13 C. B. (N. S.) 447 ; Jones v. Just (1868) L. R. 3 Q. B. 197.
5 Section 15 of the Act.
6 Mody v. Gregson, L. R. 4 Ex 49 ; Hill v. Smith, 4 Taunt 520 ; Meyer v. Everth, 4 Campb. 22 ; Gardiner v. Gray, 4 Camp. 144; all cases of written contracts which were silent as to the sale being a sale by sample.
7 Nichol v. Godts, supra.
8 Syers v. Jonas (1848) 2 Exch. 111: sale of tobacco ; Borrowman v. Rossel (1864) 16 C. B. N. S. 58.

(b) that buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The word quality has been defined in the Act as including the state or condition of the goods [Vide Sec. 2 (12)].

When is sale by sample?

According to sub-section (1), in order that a contract of sale should be a contract for sale by sample, it is necessary that there must be an express or implied term to that effect. When the contract expressly provides that the sale is by sample, there can be no difficulty[1]. Where the contract is silent on the point, the term may be implied by the usage of the trade[2].

The word "sample" has not been defined in the Act. "The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subjectmatter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchants of that class at that time[3]."

As has already been referred to above, it must not be assumed that in all cases where a sample is exhibited the sale is a sale "by sample." The seller may show a sample, but decline to sell by it, and require the buyer to inspect the bulk at his own risk; or the buyer may decline to trust to the sample and the implied condition, and require an express condition or warranty, in which case there is none implied; or the contract may be in writing, making no mention of any sample[4].

Thus in *Tye* v. *Fynmore*[5], where the seller exhibited a sample of "sassafras wood," and the buyer inspected it, and had skill in the article, and the seller then in the sale not described the goods to be "fair merchantable sassafras wood," it was held not to be a sale by sample, but a sale by description, with express condition that the wood should be what was understood by "sassafras wood."

In *Gardiner* v. *Gray*[6], the sale was of goods described in the sale note (which did not refer to any sample) as "waste silk".

Russel v. Nicolopulo (1860) 8 C. B. (N. S.) 362; 125 R. R. 683 (sale of wheat).

Syers v. Jonas (1848) 2 Exch. 111; 76 R. R. 515.

Per Lord Macnaghten in Drummond v. Van Ingen (1887) 12 App. Cas. 284 at p. 297; sale of twills by sample containing latent defects which could not be discovered on examination of the sample.

4 See Benjamin on Sale, 7th Edn., p. 676.

5 3 Camp. 462; 14 R. R. 809.

6 4 Camp. 144: 16 R. R. 764; See also Meyer v. Everth, supra: Russell v. Nicolopulo supra.

A sample was shown but it was not held to be a sale by sample. "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity."

Again, provided a specimen of the goods sold has been in existence on the basis of which an offer was accepted, the sale remains a sale by sample. notwithstanding the disappearance or destruction of the specimen. Though the specimen has turned into formula the offer and acceptance must be regarded as having been made on the basis of the accepted specimen.[1]

Implied conditions in a sale by sample.

Bulk to correspond with sample in quality

(*a*) In the case of a contract for sale by sample the first implied condition is that the bulk shall correspond with the sample in quality. As has already been observed[2], the older cases held that the term that the bulk shall agree with the sample was a warranty, collateral to the contract[3]. But Blackburn J. in a case where goods were guaranteed "about equal to sample" said: "generally speaking, when the contract is as to any goods such a clause is a *condition* going to the essence of the contract, but when the contract is as to specific goods the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages"[4]. Mr. Benjamin, after reviewing the cases, argued that the buyer might always reject the goods if the bulk did not correspond with the sample, unless (1) he had finally accepted them, or (2) the contract related to specific goods the property in which had passed to him[5]. The Act adopts this view by describing the term as a condition and not a warranty, though the parties may agree that the term shall be treated as a warranty and not as a condition[6].

Average sample

Where an average sample was taken of a large quantity of goods (beans) contained in a number of packages by drawing samples from all the packages and then mixing them together, it was held that the purchaser could not reject any of the packages on the ground that *they* were inferior to the average, nor recover for the difference in value on that ground: that the true test was whether, if the contents of all the packages delivered were mixed together, the quality of the bulk so formed was equal to that of the average sample drawn[7]. And on a contract for twenty-six bags of Persian berries by a sample drawn from three to five of the bags, where the buyer had claimed to reject some of the goods on the ground that they were inferior to the sample evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represented the average quality of the

1 Lal Chand Deep Chand v. Baij Nath Jugal Kishore, A. I. R. 1937 Cal. 140.
2 See page 218.
3 E.g. Parker v. Palmer (1821), 4 B. & Ald. 387, at p. 391, per Lord Tenterden (East India rice).
4 Heyworth v. Hutchinson (1867), L. R. 2 Q. B. 447, at p. 451; cf. Syers v. Jonas (1848) 2 Exch. 111, at p. 117, per Parke, B.
5 Benjamin on Sale, 4th Edn. p. 936.
6 Heyworth v. Hutchinson (1867), L. R. 2 Q. B. 447; Walker v. Shaw (1904) 2 K. B. 152.
7 Leonard v. Fowler (1871) 44 N.Y. 289.

entire lot, and not the quality of the amount contained in each bag taken separately[1].

Buyer must have reasonable opportunity comparing the bulk with the sample

(*b*) The second implied condition is that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. An improper refusal by the seller to allow this is a breach which justifies the buyer in rejecting the contract[2]. This clause seems to cover wider ground than section 41 (1). The latter specifies the buyer's right to examine the goods on delivery for the purpose of ascertaining whether they are in conformity with the contract, while *Larymer* v. *Smith* [on which section 15 (2) (*b*) of the English Act is based] shows that the buyer may repudiate the contract if inspection be refused *before* delivery.

Prima facie the place of delivery is the place for comparing the bulk with the sample[3]. But this presumption may be rebutted. As observed in *Heilbutt* v. *Hickson*[4] "such a contract always contains an implied term that the goods may under certain circumstances be returned, that such term necessarily contains certain varying or alternative applications, and amongst others the following, that if the time of inspection as agreed upon be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them then and there on the hands of the seller."

In *Nagardas* v. *Vel Mahomed*[5] the place of examination was at the *bunder* where the goods were delivered and not at the docks where they were carried by the buyer's agents.

Payment of price before comparison (as in c. i. f. contracts) where payments are to be made on delivery of documents) does not deprive the buyer of his right to recover the price if after comparison he finds that the bulk does not correspond with the sample and to reject the goods[6].

A mistake in the sample exhibited may prevent the formation of any contraet at all, as where the sample is inadvertently taken from a bulk difierent from the specific bulk intended and expressed to be sold[7].

The right of comparison of bulk may, like any other implied right, be excluded by an express agreement. Thus, if the terms of the contract are that the price is payable in exchange for shipping documents, the right is waived, although the buyer retains his right of subsequent inspection[8] and rejection if the goods are not according to contract.

1 Schnitzer v. Oriental Print Works (1873). 114 Mass. 123.
2 Lorymer v. Smith (1822), 1 B. & C. I.
3 Perkins v. Bell, (1893) 1 Q. B. 193, C. A. (barley delivered at T. station); Grimoldby v. Wells (1875) L. R. 10 C. P. 391; Saunt v. Belcher (1920) 26 Com. Cas. 115.
4 (1872), L. R. 7 C. P. 438, at p. 456.
5 (1930) 32 P. L. R. 454, 460. Sealiaris v. Ofverberg & Co. (1921) 37 T. L R. 307: examination of goods under a f. o. b. contract when the goods were diverted to another less suitable port under an Admiralty order.
6 Polenghi v. Dried Milk Co. (1904) 10 Com. Cas. 42.
7 Megaw v. Molloy (1878) 2 L. R. Ir. 530. Contrast Scott v. Littledale (1858) 8 E. & B. 815, 112 R. R. 791, where the seller attempted to set up his own mistake in exhibiting a wrong sample as a defence to an action by the buyer for non-delivery and was not permitted to do so.
8 Under section 41 post.

In *Lorymer* v. *Smith, supra*, there was sale by sample of two parcels of wheat containing 700 and 1400 bushels respectively on the 11th September. The buyer went to examine the bulk on the 19th September. The parcel containing the 700 bushels which was lying in the seller's warehouse was shown to him. but the seller refused to show him the other parcel which was not then at the warehouse. The buyer was held entitled to rescind the contract and the fact that a few days later the seller offered the buyer the opportunity to inspect the second parcel did not affect the matter.

(*c*) The third implied condition is that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. It presupposes that both the bulk and the sample contain a latent defect. If the defect in the sample is patent or discoverable by the exercise of ordinary diligence, the seller fulfils his contract by delivering the bulk in accordance with the defective sample. In *Mody* v. *Gregson*[1] the defendants agreed to manufacture and supply 2.500 pieces of grey shirting according to sample at 18s 6d. per piece, each piece to weigh seven pounds. The goods were manufactured, delivered, and accepted by the plaintiffs' agent as being according to sample. But the goods contained china clay to the extent of 15 per cent. of their weight, introduced into their texture for the *purpose only of making them weigh the seven pounds* The goods were thus rendered unmerchantable. This defect could not be apparent on reasonable examination of the sample. Held. the sellers were bound by merchantable quality. "The object and use of either inspection of bulk or sample, alike are to give information disclosing directly through the senses what any amount of circumlocution might fail to express. Neither inspection of bulk nor use of sample absolutely excludes an enquiry whether the thing supplied was otherwise in accordance with the contract." Under similar circumstances Lord Herschell observed in *Drummond* v. *Van Ingen and Co*[2]:

> "When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer, just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty."

This is so even where the goods have been expressly warranted only equal to sample, for such a term limits the buyer's right to complain of the quality. but does not deprive him of the right to have the kind of goods he bargained for. (See section 15 *ante*).

Section 17 (2) (*c*) presupposes that both the sample and the bulk contain a latent defect. If the latent defect is in the sample only, there is no breach of the provision and the question would seem to be whether under section 17 (2) (*a*) the bulk corresponds with the apparent quality of the sample. If the defect in the sample is patent, the seller fulfills his contract by delivering

1 L. R. 4 Ex. 49; 38 L. J. Ex. 12.
2 (1887) 12 App. Cas. 284; cf. Jatindra Chandra Banerjee v. Muralidhar, A. I. R. 1926 Cal. 749=94 I. C. 873.

the bulk in accordance with the defective samples for any implied intention that the bulk shall be of higher quality is negatived[1].

It is to be noted that under section 17 (2) (c) the seller need not be the manufacturer or one who deals in such goods; it refers to seller only. The authority of *Parkinson* v. *Lee* (1802) 2 East 314 where the seller was held not liable as he was not the manufacturer, is no longer good law. See *Randall* v. *Newson* (1877) 2 Q.B.D. at p. 106.

In a sale by sample an additional condition may be implied if the seller undertakes that the goods are fit for a particular purpose made known to him under S. 16 (1). In such cases it seems that in addition to the goods being equal to the sample they must be reasonably fit for the purpose[2].

It is also to be observed that section 116 of the Contract Act which provided that in the absence of fraud and of any express warranty of quality the seller of an article which answers the description under which it is sold, is not responsible for a latent defect in it, has been repealed. In cases where there is an implied condition as to merchantable quality *e. g.* sections 16 (2), 17 (2) or as to fitness for a particular purpose, *e.g.* section 16 (1) the seller is liable for latent defects not discoverable on reasonable examination even if there is no fraud. In such cases the implied condition can only be excluded by express provisions to the contrary. See *Randall* v. *Newson* (1877) 2 Q. B. D. 102. See *Pinnock Bros.* v. *Lewis & peat* (1923) I. K. B. 690: a clause excluding liability for latent defects does not protect the seller when the goods supplied are quite different in substance from the goods contracted for[3].

Dangerous goods.

As to the position of the seller of dangerous goods Collins M. R. made the following observations in *Clarke* v. *Army & Navy.*[4] "It seems to me that, independently of any warranty, a relation arises out of the contract of sale between the vendor and purchaser, which imposes on the former a duty towards the latter; namely a duty, if there is some dangerous quality in the goods sold of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be requisite". In that case there was a sale of a tin of disinfectant powder which the seller knew was likely to cause danger, unless special care was taken in opening the tin. The buyer not having been warned of the danger opened it in the ordinary way when a portion of it flew out and injured the buyer's eyes. Held, the seller was liable for the injury so caused.

But the seller would not be liable if he had no knowledge of the dangerous character of the goods. In *Bates* v. *Batey & Co.*[5] there was sale of ginger beer in bottles which was defective but the seller had no knowledge of it. The bottle burst when being opend by

1 See Halsbury, Laws of England, 2nd Edn., Vol. XXIX p., 69; Mody v. Gregson, supra.

2 See Drummond v. Van Ingen, (1887) 12 A. C. 284, 294.

3 See also Canada Atlantic Grain, etc., Co. v. Eilers (1930) 35 Com. Cas. 9 cited at p. 214.

4 (1903) 1 K. B. 155, 164.

5 (1913) 3 K. B. 357.

the buyer and injured him. It was held that the seller was not liable. In that case it was also held that the seller could have discovered the defect by the exercise of reasonable care, but still he was not liable in as much as the goods were not dangerous by themselves but became so through a defect occasioned by breach of contract in its manufacture or delivery[1].

With regard to an article which is dangerous in itself the manufacturer has a duty to the person to whom he supplies it to warn him of its character and a breach of this duty may render him liable to the recepient or to a third person in whose hands he ought to contemplate it may come, if he is injured while using it. But if the danger is disclosed or is apparent on the face of it there is no obligation if any person is injured through imperfect manufacture[2]. In this case it was also held that the question whether the article (in that case a brazing lamp) was dangerous in itself so as to impose a duty upon the sellers in regard to it to a person to whom they supplied it or into whose hands they came was a question of law for the judge and not of fact for the jury.

In *Langridge* v. *Levy*[3], the seller was held liable for injury caused to the son of the buyer by using a gun in which a defect was fraudulently concèaled by the seller ; the use of the gun by the son was in the contemplation of the parties. *George* v. *Skwington* (1869) L. R. 5. Ex.I : dangerous hair wash was compounded by the seller himself; seller was held liable for injury caused to wife. *Cavalier* v. *Pope* (1905) 2 K. B. 761.

1 But see White v. Ste[illegible]man (1913) 3 K. B. 340 : hire of a vicious horse.

2 Blacker v. Like (1912) 106 L. T. 533.

3 (1837) 2 M. & W. 519.

CHAPTER III

EFFECT OF THE CONTRACT

Transfer of property as between seller and buyer

Goods must be ascertained

*18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained

Transfer of property as between seller and buyer.

The passing or transfer of property constitutes the most important element in the law relating to contracts for the sale of goods. If goods are destroyed by fire or otherwise, it is essential to know who has to bear the loss; and in bankruptcy of either party, it is essential to know whether goods vest in bankrupt's trustee or not.

This and the five following sections of the Act deal with the question of transfer of property as between seller and buyer, and distinguish for that purpose a contract for the sale of unascertained goods from a contract for the sale of ascertained goods.

According to the principle underlying Ss. 18 and 19 of the Sale of Goods Act the property in the goods does not pass to the purchaser until he exercises an option and selects the article. Consequently where it was left to the purchaser to choose one of the two tins of 'Rung' the sale wound not be complete until he had exercised his choice and on his failure to do so he could not be held liable for the price[1].

Property cannot pass until the goods are identified—unascertained goods.

A contract of sale of goods includes both sale as well as an agreement to sell[2]. When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory contract *i. e.* an agreement to sell. "If A buys from B ten sheep generally, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be

* **Analogous law.**

Section 16 of the English Sale of Goods Act, 1893, which is the same as section 18 of the Indian Act.

Old section 82 of the Indian Contract Act, 1872, which was to the following effect:—

"Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained."

Pukraj v. Maghraj. 1939 Mar. L. R. 103 (Civ.)

Section 4 of the Act

done before it can be true that any particular sheep can be said to have ceased to belong fo B, and to have become the property of A[1]." In accordance with these principles, this section provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Thus the ascertainment of the goods is condition on which the transfer of the property depends. In any given case there may be a question whether this condition is fulfilled or not, and it may be that the property will not pass even if it is fulfilled, but until it is, there is no possibility of the property passing: or as put by Lord Blackburn, "it is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so the contract cannot be construed as a contract to pass the property in that article." .....It is a question of the construction of the contract in each case at what stage the property shall pass and a question of fact whether that stage has been reached"[2].

The term "specific goods" is defined in the Act as meaning goods identified and agreed upon at the time a contract of sale is made[3]. Chief instances of "unascertained goods" are "future goods," that is to say, articles to be manufactured or acquired, or a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract. "Ascertained goods probably mean goods identified in accordance with the agreement after the time a contract of sale is made"[4].

The word "property" in the section means the general property in goods, and not merely a special property [section (2) (11), *ante*].

It may be noted that the ascertainment is a necessary condition to the agreement to sell becoming a sale[5]. But other conditions to the passing of the property after ascertainment may be imposed[6]

Goods may be ascertained by an act and in any manner which indicates their appropriation to the contract.

See notes under S. 23, infra.

Portion of a bulk.

If goods sold form portion of a bulk, they are not ascertained unless they are separated from the bulk and this is so even though the bulk be of uniform quality and value.[7] In *Laurie & Morewood* v. *Dudin*[8] a delivery order for 200 quarters of maize had been given

Benjamin on Sale, 7th Edn., p. 316. See also Badische etc. v. Hickson (1906) A. C. at p 421.
Seath v. Moore (1886) 11 App. Cas. 350, at p. 370.
Section 2 (14) of the Act, See pages 18 and 46 to 48.
Per Atkin J. in re Wait (1927) 1 Ch. at p. 630.
Section 4 (3) and (4), ante.
Wait v. Baker (1848). 2 Ex. 1. 9; 17 L. J. Ex. 307; 76 R. R. 469.
Wallace v. Breeds (1811) 13 East. 522: Sale of oil in bulk; Boswell v. kilborn (1862) 15 Moo. P. C. 309; hops not separated from bulk; Sheepley v. Davis (1814) 5 Taunt. 617: hemp in bulk Snell v. Heighton (1883) I Cal. & El. 95: sale of brick not separated from bulk; Pletts v. Campbell (1895) 2 Q. B. 229: sale of one jar of beer out of the other jars contained in a cart.
(1926) 1 K. B. 223; 95 L. J. K. B. 191 (C. A.)

to the buyers and lodged with the warehousemen who held 618 quarters of maize. It was held by the Court of Appeal that the giving of the delivery order and its lodgment with the defendants did not pass the property before severance of the 200 quarters from the bulk. Similarly, contract for the sale of shares in a company, which are not identified by numbers, does not transfer any property to the buyer[1].

Bayley B. observed in *Gillett* v. *Hill*[2] :

"Those cases may be divided into two classes : one in which there has been a sale of goods, and something remains to be done by the vendor and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, e.r a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit ; then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable before that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is *no individuality* until it has been divided." And Scrutton L. J. further remarked in *Sterns* v. *Vickers*[3]:

"Nor probably will the acquisition of such an undivided interest pass the property, so as to entitle the purchaser to sue for a conversion, in the case where the power of appropriation is, as here, in a third party."

When, therefore, the individuality of the goods depends upon their being weighed, repeated, counted, or having similar acts done in relation to them, the doing of such an act is the first condition precedent to the passing of the property.

In *Wait & James* v. *Midland Bank*[4], W. & J. sold to R. & Co. by three contracts 1,250 quarters of wheat out of a bulk in a warehouse. R. & Co. gave bills and took delivery of 400 quarters and pledged the remaining 850 quarters to the Midland Bank. R. & Co. paid for 250 quarters, but their subsequent bills were dishonoured, and W. & J. notified the warehousemen to stop delivery. R. & Co. then became insolvent. W. & J. in the meantime had sold all the wheat in the warehouse except in 850 quarters. *Held*, that the 850 quarters had become, by process of exhaustion, "ascertained," and the property had passed to R. & Co. and so to the bank. So long as the goods are unascertained, merely entering a delivery order or making a transfer in the books of the warehouseman will not pass the property in the goods[5].

In *Brij Coomarie* v. *Salamander*[6] it was held that a buyer had no insurable interest under a policy as the goods were not ascertained or appropriated, not being separated from the bulk which contained goods sold to others.

It may be observed that the ascertainment of the goods does not of itself necessarily pass the property. It does so only if the

Domingo v. de Souza A. I. R. 1928 All. 481= 50 All. 695, Cf. Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co. A. I. R. 1926 P. C. 38=94 I. C. 824= 50 Bom. 360.
2 Cr. & Mee. 530, at 535 ; 3 L. J. Ex. 145 : 39 R. R. 833.
(1923) 1 K. B. 78 ; 92 L. J. K. B. 331 (C.A.)
(1926), 31 Com. Cas. 172 : See also R. v. Tideswell (1905) 2 K. B. 273.
Burk v. Davis (1814) 105 E. R. 429 15 R. R. 288, see also Laurie v. Dudin, (1926) 1 K. B. 223 ; Re Wait (1927) 1 Ch. 606.
(1905) 32 Cal. 816.

parties have agreed that the property in the goods should pass when ascertained[1], or in other words, there must be also either appropriation with the assent, express or implied, of the parties or delivery. But the parties may agree that the property may pass at any stage. The intention of the parties, if clear, is the deciding factor in all cases.

Mixing of goods

According to the Civil Law of Rome the mixing together of things solid or dry (commixio) or of things liquid (confusio) belonging to different owners, does not affect their ownership if the goods could be separated. If such separation is not practicable the owners become the joint owners of the whole whenever the mixture has been made with the consent of all the parties, or by accident.

The same rule has been adopted by the courts in England. See *Spence* v. *Union Marine Ins. Co.*[2] In that case cotton belonging to several owners was shipped in bales specifically marked. In the course of the voyage the ship was wrecked with the result that some of the goods were lost and with regard to those that were saved the marks were obliterated and, without the fault of the owner, were so mixed up that one part was undistinguishable from the other. It was held that all the owners became tenants in common of the goods saved.

There are cases where ownership existed before the mixing took place. Thus where part of the goods out of a bulk was sold and was subsequently appropriated and so property passed to the buyer, subsequent mixing up of the part with the whole will not deprive the buyer of the property in it but will make him owner in common with the seller.[3]

Event identifying goods

The contract may provide that on the occurrence of a specified event sufficient to identify the goods contracted for the property should *ipso facto* pass. Thus it is competent to parties to contract that fruit as it falls from the tree, or building materials as they are brought upon land by a builder[4], or certified by an engineer[5], should become the property of the buyer[6]. In *Maneckji* v. *Wadilal*[7] it was held that in cases of contracts for the sale of shares, as soon as the seller hands over the certificates and blank transfers and the buyer accepts them and gives the seller the cheque, the goods become ascertained goods, the sale is complete and the property passes.

Passing of property and risk.

It is to be noted that the passing of the property, and the passing of the risk in regard to the goods need not necessarily be coeval. It is quite possible that the risk may pass independently of the passing of the property though

1 Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 76; Wait v. Baker (1848), 2 Exch. 1, 9; Campbell v. Mersey Docks and Harbour Board (1863), 14 C. B. (N. S.) 412.
2 (1868) L. R. 3 C. P. 427, 437.
3 See Hayman v. M. Lintock, (1907) 9 F. 936.
4 Reeves v. Barlow (1884); 12 Q. B. D. 436; 53 L. J. Q. B. 192 (C. A.).
5 Banbury and Cheltenham Ry. Co. v. Daniell (1884), 54 L. J. Ch. 265,
6 Benjamin on Sale, 7th Edn., p. 346.
7 A. I. R. 1926 P. C. 38=50 Bom. 360; see also Shanker Lal v. Jamna Das, (1937) 39, P. L. R. 778 (provision for postponement of delivery till payment will not per se stay passing of property).

usually it passes with the property. In *Sterns* v. *Vickers*[1] the defendants sold to the plaintiffs a quantity of white spirit, part of a larger quantity lying in a tank belonging to a storage company, and handed to the plaintiffs a delivery warrant by which the storage company undertook to deliver that quantity of spirit to the plaintiffs' order. The plaintiffs endorsed the warrant to their purchaser who paid rent to the storage company from the date of the warrant. Subsequently and before severance the spirit in the tank deteriorated in quality. It was held by the court of appeal on the facts that the risk passed to the plaintiffs on delivery of the warrant, although they might have acquired, strictly speaking, not property but only an undivided interest in the whole bulk.

Property passes when intended to pass

19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Analogous law.

This section corresponds to section 17, and clause I, of section 18, of the English Sale of Goods Act, 1893. Sub-sections (1) and (2) are a verbatim adoption of section 17 and sub-section (3) follows clause I of section 18, the remaining clauses being enacted as sections 20 to 24 of the Act. Section 19 is based on the principle of the English law that the property may pass by the contract itself if such be the intention of the parties "Where by the contract itself" says Lord Wensleydale, "the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of this contract, therefore, is to vest the property in the bargainee[2]".

Old section 78 of the Indian Contract Act provided that when an offer and acceptance had taken place, the property in the thing did not pass until any one of the following conditions had been complied with:

1 (1923) 1 K. B. 78; 92 L. J. K. B. 331 (C. A.); see also Laurie v. Dudin, (1925) 2 K. B. 383; (1926) 1 K. B. 223 and notes under section 26 of the Act.

2 Dixon v. Yates, 5 B & Ad. 313 (340).

(*i*) earnest or tender, payment or part payment of the price, or

(*ii*) delivery or part delivery of the thing, or

(*iii*) an agreement, express or implied, for the postponement of delivery or of payment, or of both.

Regarding ascertained goods, that section provided :—

'Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.'

The principle of section 17 of the English Act is that the property may pass by the contract itself, if such be the intention of the parties. On this point there was a conflict of opinion in Indian courts before the enactment of the Indian Sale of Goods Act, 1930. Dealing with a question of the passing of property Sir William Markby observed : "I think this is not a question to be decided simply upon the construction of the Contract Act, but upon the intention of the parties upon which all questions of this kind ultimately depend[1]." A contrary view was held by Maclean C. J. in *Brij Coomaree* v. *Salamandar Fire Insurance Co.*[2] in which, without referring to Sir Willian Markby's judgment, the learned Chief Justice held that section 78 of the Contract Act laid down a rule which the parties could not by their agreement vary. In *Amies* v. *Jal*[3] also the Bombay High Court was of the opinion that Macleam C. J.'s view in the above case was unsound[4].

Meaning and scope of section 19.

Section 78 of the Contract Act being vague and indefinite on this point, it was considered desirable by the special committee to follow the clear and definite rule recognized in English Law, *viz.*, that unless a contrary intention appears by the contract, the contract itself is sufficient to pass the property in the goods sold.

The parties, no doubt, may make any bargain they like and the law will give effect to it. When the parties express their intention clearly no difficulty arises. The contract may pass the property at once, or at a future time or contingently on the performance of some condition. But in many cases the parties either form no intention on the point or fail to express it. To meet such cases a series of definite rules have been worked out for determining when the property is to be deemed to pass according to the imputed intention of the parties. These rules have been reproduced in section 18 of the English Act and they have been adopted in sections 20 to 24 of the Indian Act.

Sub-section (3) states the general proposition that unless a different intention appears, the property passes in accordance with the rules mentioned in sections 20 to 24. This applies both to specific

1 Buchanan v. Audall, 15 B. L. R. 276 at p. 289.

2 I. L. R. 32 Cal. 816.

3 A. I. R. 1924 Bom. 41=25 Bom. L. R. 778 ; see also Scott & Hodgson v. Keshavlal A. I. R. 1930 Bom. 529=54 Bom. 862 ; Bhimji v. Bombay Trust Corporation, A. I. R. 1930 Bom. 30C Peare Lal v. Diwan Singh, A. I. R. 1930 All. 661=125 I. C. 453 ; Abdul Aziz v. Jogendra, (1917) 44 Cal. 98 ; Baij Nath v. Nand Ram, A. I. R. 1926 Pat. 353=95 I. C. 867.

4 See Report of the Special Committee

and unascertained goods while sub-sections (1) and (2) apply to the case of specific or ascertained goods. These rules, however, are not exhaustive and in applying them to determine the intention of the parties, regard must be had of the provisions of sub-section (2) of this section i.e. of the terms of the contract, the conduct of the parties and the circumstances of the case. It is the intention of the parties which is of the first importance in determining this question and no hard and fast rule can be laid down which may cover all the cases but every case must be decided on its own facts and the rules here given, are only illustrative and not exhaustive[1]. The rules referred to are only rules of presumption which could be rebutted by evidence of a contrary intention.

Property passes when intended to pass.

If the parties so agree, the property may pass in goods appropriated by mutual assent to the contract although there remain acts to be done by the seller before the goods are deliverable[2]. If the article is not in a deliverable state and the possession is still with the seller who is required by the contract to do something in connection with it and the price also is not paid the presumption is that the parties did not intend to pass the property by the mere fact of entering into the contract. Where, however, it appears from the agreement that the price is agreed to be paid before the goods are in a deliverable state that fact itself affords an indication that the parties intended the property to pass immediately in as much as so long as the price remains unpaid that the property should pass as he gets rid of the risk while if he has paid partially or entirely it is in the buyer's interest that the property should pass to him for if the property has passed to him and the seller becomes bankrupt he gets the article himself as being his property while if it has not passed he can only share rateably with other creditors for what he has paid.

It is open to the parties to fix any time or stage of the transaction when the property may pass from the seller to the buyer and when such intention is expressed or can be unequivocally inferred from the agreement of the parties the mere fact that the seller had still something to do with the goods will not prevent the property from passing to the buyer at such time or stage.[3] Where a delivery order was given for bricks and the seller's agent informed the buyer that all the bricks finished as well as unfinished in certain clamps were appropriated to the contract it was held that the property in the bricks in all the clamps passed to the buyer.[4]

Sub-section (1) of this section lays down the rule that it is the intention of the parties that determines whether the property in the goods agreed to be sold has passed or not.[5] As observed by Lord Blackburn in *Seath & Co.* v. *Moore*:[6] "It is competent to parties to

1 Calcutta Co. v. De Mattos, 32 L. J. Q. B. p. 329; Furley v. Bates, 33 L. J. Exch. 43; Young v. Mathews, L. R. 2 C. P. 127.
2 Remfry, p 148.
3 Seath v. Moore, 11 App. Cas. 350 (370); Furley v. Bates, 33 L. J. Ex. Ch. 43; Kershew v. Ogden, 34 L. J. Ex. Ch. 159.
4 Young v. Mathews, 36 L. J. C. P. 61.
5 Seath v. Moore (1886) 11 App. Cas. 350; Reid v. Macbeth (1904) A. C. 223 H. L.; McEntire v. Crossley (1895) A. C. 457; Sir J. Laing v. Barclay (1908) A. C. 35, H. L.
6 (1886) 11 App. Cas. 350.

agree for valuable consideration that specific article shall be sold and become the property of the buyer as soon as it has attained a certain stage though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should then pass. "It is I think, a question of the construction of the contract in each case at what stage the property shall pass; and a question of fact in each case whether that stage has been reached."

The intention is to be gathered from the terms of the contract, the conduct of the parties and the surrounding circumstances[1]. "The rule of construction", observed Kelby, C. B., "applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, and upon which a liberal construction of every word would either be impracticable or would leave the contract indeterminable and uncertain"[2]. "The inference in mercantile contracts" says Kennedy L. J. "is that each party will do what is mercantiley reasonable."[3] In *Chidambaram Chettiar* v. *Steel Bros.*[4] there was a mixed contract for storage of paddy and its subsequent sale. The paddy was in the first instance delivered to the defendant for storage, and the plaintiff had the option to name a day on which the defendant was to buy at his current buying rate for that day. In these circumstances, the property in the goods was held not to pass until the option had been exercised; and as to the price, it was held that if the defendant had made no purchases that day, the rate must be fixed having regard to the market price.

In *Kahn & Kahn* v. *Premsukh*[5] it was remarked that though the incidence of risk is a good test in determining in which of the two parties the property in the goods vests, it is not a conclusive test and the question always is one of the intention of the parties, as other circumstances may show that the property was retained by one party in spite of the fact that they were shipped or booked at the risk of the other party.

Cases where in the past the Indian courts recognized that they would be free to give effect to the agreement of the parties on this point, may still be cited as authorities under the present law.

Sub-section (2); The Parchin (1918) A. C. 157, at p. 161; Badische Anilin Fabrik v. Hickson (1906) A. C. 419; Saks v. Tilley (1915) 32 T. L. R. 148, C. A.

1. Per Kelby C. B. in Coddington v. Paleologo, L. R. 2 Exch. 193 (200) cf.
2. Per Lord Esher in Horick v. Muller, 7 Q. B. D. 92 (103).
3. Biddle Bros. v. E. Clemens Horst & Co., (1911) 1 K. B., P. 958.
4. A. I. R. 1936 Rangoon 419=165 I. C. 308.
5. A. I. R. 1931 Lah. 260=134 I. C. 1110.

Ascertained goods

The Act does not define the term "ascertained goods," though "specific goods" is defined as meaning goods identified and agreed upon at the time a contract of sale is made. The former is really of wider import. As contrasted with specific goods, it may be intended to cover the case of goods which have become ascertained subsequently to the formation of the contract[1], although they would not be "specific goods" as defined by the Act.

Transfer of shares in company — complete title when passes—agreement to transfer and delivery of share certificates —effect of.

A promissory note was executed for cash paid, and it was agreed that the note should be returned duly cancelled on the promisor getting 20 shares of a company standing in the name of his father-in-law, R, transferred to the payee or his nomine. R executed an agreement in which he undertook to transfer the shares to the payee and further stated : "I herewith hand over to you duly endorsed the share certificates". This agreement was signed by R and countersigned by the payee. The actual share certificate contained an endorsement of transfer signed by R, transferring the shares to the payee, but the space for the signature of the transferee and the company's officials was not filled up. Nothing further was done in the matter of the transfer until the company got into difficulties and went into liquidation after some months. In a suit on the promissory note for the amount thereunder, *held*, that it could not be said that the agreement executed by R, by itself would amount to a transfer deed sufficient to cause title to pass; it purported to be an agreement of transfer accompanying the actual instrument of transfer, and if the instrument of transfer had not been completed so far as the transferor could complete it, the agreement by itself would be nothing more than an enforceable agreement to convey, and until the transfer endorsement was signed, the shares would be *unascertained goods* and they would not be in a deliverable state. But if R. signed both the agreement and the transfer endorsement on the share certificate and communicated the fact to the payee who counter-signed the agreement in token of acceptance of the transfer, then it would be the payee's fault that he did not cancel the note and get the formalities of the transfer completed. In such circumstances the title in the shares would pass to the transfer and the payee would be disentitled to sue on the note[2].

Specific goods in a deliverable state

***20.** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

1. Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 83; Atkin L. J. In re wait (1927) 1 Ch. 606 at p. 630.
2. Kuppiah Chetty v. Saraswathi Ammal. A. I. R. 1941 Mad. 769=1941 M. W, N. 919.

* **Analogous law**

Rule I, section 18 of the English Sale of Goods Act, 1893, which is the same as section 20 of the Indian Act.

Unconditional sale of specific goods in a deliverable state —property in the goods passes to the buyer when the contract is made.

Sub-section (2) of section 4 of the Act refers to conditional contracts of sale[1]. The present section lays down that where there is an *unconditional* contract for the sale of *specific goods* in a *deliverable state*, the property in the goods passes to the buyer when the contract is made, and that it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

The term "specific goods" is defined in section 2 (14) of the Act as meaning 'goods identified and agreed upon at the time a contract of sale is made'. And according to section 2 (3), goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them.

The section may be illustrated by the following examples:— Illustrations

(1) The defendant agreed to sell to the plaintiff a certain stack of hay for 145. payable on the ensuing February 4, the stack to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, the goods being specific and in a deliverable state, although there was also a stipulation that the hay was not to be cut till paid for[2]. "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee."

(2) Sale of a specified number of bushels of oats, the contents of a bin in a warehouse. The seller gives a delivery order to the buyer, addressed to the warehouseman, authorizing delivery of the oats to the buyer, and asking the warehouseman to weigh them. The warehouseman accepts the order and enters it in his books. The property has passed to the buyer as the weighing was not necessary to identify the oats or to ascertrin the price, but was merely for the satisfaction of the buyer[3].

It is to be observed that this and the following four sections must be read subject to the opening words of section 19 (3): "Unless a different intention appears." Parke B. said in *Dixon* v. *Yates*[4]:

"I take it to be clear that by the law of England, the sale of a specific chattel passes the property in it to the vendee without delivery.........The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession."

Similarly, Sir Cresswell observed in *Gilmour* v. *Supple*[5]:

"By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, *unless it can be shown that such was not the intention of the parties.*"

1 See note on pages 94 to 101.
2 Tarling v. Baxter (1827) 6 B. & C. 360, 30 R. R. 355.
3 Swanwick v. Sothern (1839) 9 A. & E. 895, 48 R. R. 740.
4 (1833) 110 R. E. 806; 39 R. R. 489.
5 (1858) 11 Moo. P. C. 551 at p. 566; 117 R. R. 97, 106; approved by Blackburn J. in The Calcutta Company v. De Mattos (1863) 32 L. J. Q. B. 322, at 329; 139 R. R. 752, 764.

Presumption created by this section not displaced by postponement of the time of payment of the price or the time of delivery of the goods, or both.

The rule laid down in this section is not affected by the fact that the time of payment of the price or the time of delivery of the goods, or both, is postponed. The rule will still be applicable where the price is not fixed by the contract[1]. Similarly "it may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was paid by the contract to precede delivery, but still the property is changed.[2]"

In *Dwarka Das* v. *Ram Rattan*[3] where specific goods in a deliverable state were sold but the buyer requested the seller to postpone delivery till a convenient time, it was held that the property had passed. In *Shankar Das* v. *Bhana Ram*[4] where the vendors who had not actual possession, but had only the railway receipt in their hands, made a sale by endorsing the railway receipt in favour of the buyer, it was held that property passed on the making of the contract.

To constitute a complete sale, the precise thing sold as well as the price must be ascertained. Where ascertained existing goods are the subject of a contract of immediate sale, and whether there is a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor there has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done, such as, for instance, in most cases, delivery—in some cases actual payment of the price—and in other cases weighing or measuring in order to ascertain the price, or marking, packing, coopering, filing up casks, or the like. The case where there is a warranty of the quality of such specific goods has already been examined[5]. This circumstance will not prevent the property in them passing to the purchaser, and, if it is simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and, in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so.

The mere fact that something remains to be done by the *buyer* under the contract with reference to the goods, is not of itself sufficient to displace the presumption. In *Furley* v. *Bates*[6] the contract was for the sale of a heap of clay as a whole at a certain price per ton, and by the contract the buyer was to load the clay on his own carts, and to weigh each load at a certain weighing machine which his carts had to pass on their way from the seller's ground, on

1 Joyce v. Swann (1869) 17 C. B. (N. S.) 84, 142 R. R. 258.
2 Per Lord Blackburn, Seath v. Moore (1886) 11 App. Cas. 350, at p. 370; Peare Lal, Kishan Prasad v. Diwan Singh, Ganeshi Lal, A. I. R. 1930 All. 661=125 I. C. 453.
3 A. I. R. 1922 All. 458=68 I. C. 239.
4 A. I. R. 1926 Lah. 606=7 Lah. 406.
5 See under section 16 of the Act.
6 2 H. & C. 200, 133 R. R. 639, Compare Kershaw v. Ogden (1865) 3 H. & C. 717, 140 R. R 694.

which the heap of clay lay, to the buyer's place of deposit. It was held that the property in the clay had passed to the buyer. The clay in this case was in a state in which the buyer was bound to take delivery of it, and nothing further remained to be done by the seller to ascertain the price. In *Shoshi Mohun Pal* v. *Nobo Krishto*[1] the plaintiff contracted with the defendant to sell him 975 maunds of rice, being the whole contents of a certain gola at a certain rate, and the defendant paid certain earnest money and agreed to remove the whole of the rice after weighing on or before a certain date, and delivery was taken of a part. It was held that the property in the goods had passed to the defendant. "So far as the vendors were concerned nothing remained to be done on their part to the rice sold for the purpose of ascertaining the amount of the price. The rice was to be weighed for the satisfaction of the purchaser."

When the subject-matter of the sale is ascertained at the time the bargain is struck, and the price is likewise agreed upon, the sale is a complete sale from the time of the making of the bargain, and the right of property in the thing sold and the risk of loss are transferred to the purchaser, although the right of possession may continue in the vendor until the purchase-money has been paid or tendered[2]. The right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the right of possession divested out of the original vendor[3].

But the mere fact that goods are bought by lot after inspection will not make section 20 of the Act applicable so as to pass property in the goods to the buyer the very moment the sale is affected. Where the seller has to deliver the goods to the buyer at a place different from that where the contract of sale is effected and to tranship the goods by rail to the place of delivery, and the buyer has to pay only for the actual weight of goods delivered to him at the place of delivery, property in the goods cannot pass to the buyer until the goods, if so required by the buyer, are weighed at the place of delivery. In such a case section 22 applies. This is particularly so in the case of goods such as scrap iron, the weight of which decreases to certain extent in transit[4].

"Unless a different intention appears"—*intention of the parties to be regarded.*

As already observed, this and the following four sections must be read subject to the opening words of section 19 (3): "Unless a different intention appears." Thus, whereas the rule laid down in this section is the *prima facie* rule of construction, in each case the intention of the parties must be ascertained and acted upon: In *Abdul Aziz* v. *Jogendra Krishna*[5] nothing remained to be done to the goods by the seller for the purpose of ascertaining the

1 (1878) 4 Cal. 801, Compare Swanwick v. Sothern, supra; Nanka Bruce v. Commonwealth Trust (1926) A. C. 77 P. C; Peare Lal—Kishen Prasad v. Diwan Singh—Ganeshi Lal. A. I. R. 1930 All. 661=125 I. C. 458.

2 Bloxam v. Sanders, 4 B. & C. 941; Knight v. Hopper, Skin, 647.

3 Scott v. England, 14 L. J. Q. B. 43.

4 Ugarchand Gajanand v. Motiram Ghanshamdas, A. I. R. 1938 Sind 18=173 I. C. 535.

5 (1916) 44 Cal. 98, 36 I. C. 119.

amount of the price. It was held by the Calcutta High Court that the property did not pass to the buyer, since the intention of the parties, to be inferred from the usage of the trade, was that the sale should not be complete until the goods had been tested, selected and weighed by the buyer. In *Amies* v. *Jal*[1], an agreement for the sale of a motor car, of which the price was to be paid in monthly instalments, contained among others a term that in default of payment of any one instalment the seller should be at liberty to terminate the agreement and take possession of the car without being liable to refund to the buyer the instalments paid by him. The court held that the intention of the parties as expressed in the condition was that the property in the car should not pass until the full price was paid.

On the other hand, in *Kuttayan Chetty* v. *Palaniappa Chetty*[2], where the defendant agreed to sell paddy to the plaintiff on the terms that the plaintiff should pay 1,000 rupees in advance, and the balance of price on delivery, and it was agreed that on assignment of a debt of 100 rupees and a hundi for 900 rupees should be accepted as payment of the advance, it was held that the property in the goods passed to the plaintiff on assignment of the debt and delivery of the hundi by the plaintiff to the defendant and that the plaintiff was entitled to damages for the wrongful sale of the paddy to a third person.

Deliverable state.

In order that the rule laid down in this section may apply, the specific goods must be in a deliverable state and the property would not pass if the goods are not in a deliverable state[3]. Consequently where the contract was for the sale of a fixed condensing engine, which had to be severed and delivered free on rail at a specified price, and it was damaged in transit before it reached the railway, it was held that the property had not passed, as when it reached the railway it was not in a deliverable state[4]. In *Kursell* v. *Timber Operators*[5] there was a sale of uncut timber defined to be "all trunks and branches of trees, but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground," the timber to be cut not more than twelve inches from the ground, the purchasers having fifteen years in which to cut the timber. *Held*, that the contract was not a contract for the sale of specific goods within section 18 (1) of the English Act (corresponding to section 20 of the Indian Act); that the goods were neither identified nor agreed upon: that the timber was not in a deliverable state until the purchasers had severed it; and that, therefore, the property in the uncut timber did not pass when the contract was made.

Conditional contract

Again, if the contract is conditional the property would not pass unless the condition is fulfilled. In *Anglo-Egyptian etc.* v. *Rennie*[6],

1 A. I. R. 1924 Bom. 41 = 77 I. C. 150.
2 (1904) 27 Mad. 540 cf. Aronson v. Mologa Holzindustrie A. G. Leningrad (1928) 138 L. T. 470, C. A.
3 Simmons v. Swift (1826) 5 B. & C. 857: sale of a stack of bark at a certain price per ton: held, property did not pass until weighment, that being necessary to ascertain the amount to be paid.
4 Underwood v. Burgh Castle Cement Syndicate (1922) 1 K. B. 343, C. A.
5 (1927) 1 K. B. 298 (C. A.); 95 L. J. K. B. 569. See Logan v. Le mesurier (1847) 6 Moo. P. C. 116: sale of timber to be sold after measurement.
6 L. R. 10 C. P. 271.

it was held that the property in new boilers and certain new machinery for a steamship was not intended to pass until they were fixed on board the ship.

Non-severable contract of movable and immovable property.

This section does not apply to the case of a non-severable contract for the sale of specific goods and of an interest in land. Such a contract is with regard to the goods, *prima facie* only an agreement to sell, and the transfer of the property in the goods is *prima facie* conditional on the conveyance of the interest in the land[1]. If, however, the buyer has appropriated the goods without a conveyance of the interest in land, he must pay for the goods[2]. The rule stated above applies even though separate prices have been fixed for the goods and for the interest in land[3].

As to the period of limitation for a suit by a purchaser of movable and immovable property to recover the movable property from the hands of a subsequent purchaser, see *Dhondiba* v. *Ram Chandra*[4].

The expression 'sale of immovable and movable property combined' does not necessarily mean 'sale of connected immovable and movable property but applies to all agreements for the sale of property part of which is movable and part immovable'[5].

*21. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Specific goods to be put into a deliverable state

Seller to put the specific goods in a deliverable state.

This section lays down that where there is a contract for the sale of specific goods and the *seller* is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof. Where, however, no such act is required or is obligatory on the seller, as where it is to be done merely for the satisfaction of the buyer and not in pursuance of a condition in the contract, or where the buyer is to do such act himself or for his own

1 Lanyon v. Toogood (1844) 13 M. & W. 27 (sale of house and furniture) cf. old section 85 of the Indian Contract Act which provided that where an agreement is made for the sale of immovable and movable property combined, the ownership of the movable property does not pass before the transfer of the immovable property. This section has been omitted from the present Act. See also Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 84.

2 Sleddon v. Cruikshank (1846) 16 M. & W. 71.

3 Neal v. Viney (1808) 1 Camp. 471.

4 (1881) 5 Bom. 554.

5 Maung Paw v. Maung Saw, 12 I.C. 805.

* **Analogous law.**

Rule (2) in section 18 of the English Sale of Goods Act, 1893, which is the same as section 21 of the Indian Act.

Old section 80 of the Indian Contract Act, 1872, which was to the following effect :—

"Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done."

satisfaction and not the seller, section 21 does not postpone the passing of the property and section 20 may apply. In *Rugg* v. *Minett*[1]; a quantity of turpentine, in casks, was put up at auction in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the sellers out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but they had not been gauged by the custom House Officers, which it was the *buyer's* duty to get done. A few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The court held, that the property had passed in those lots only which had been filled up, because "everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state."

Blackburn observes[2] :

"Where by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property......In general it is for the benefit of the seller that the property should pass ; the risk of loss is thereby transferred to the buyer[3], and as the seller may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the seller pure gain. It is, therefore, reasonable that where by the agreement *the seller is to do something* before he can call upon the buyer to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be that the seller was to do this before he obtained the benefit of the transfer of the property."

The important points are that something should remain to be done, (*i*) by the seller, (*ii*) to the goods, (*iii*) for the purpose of putting them into a deliverable state and (*iv*) the buyer must have notice.

In *Acraman* v. *Morrice*[4], where in respect of a contract for sale of certain oak trees, it was the custom of the trade for the buyer to select and for the seller to sever the portions rejected, it was held that the goods could not be said to be in a deliverable state unless the severing of the rejected portions had been done by the seller and that the buyer could not claim that property had passed merely by making the severance himself.

Where the sale was of a specified stack of bark, at £9 5s. per ton, to be weighed by the seller's and the buyer's agents, and part was weighed and taken away and paid for, *held*, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence

1 11 East, 210 ; 10 R. R. 475. See also Padamsi v. Shankar A. I. R. 1926 Nag. 410=95 I. C. 188.

2 Blackburn on Sale, 2nd Edn., pp. 174-175.

3 See section 26 of the Act.

4 (1849) 137 E. R. 584 ; 70 R. R. 568.

of the seller in the act of weighing was necessary[1]. "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed[2]."

On the other hand in *Gilmour* v. *Supple*[3] the words of the contract were : "Sold Allan, Gilmour & Co, a raft of timber, now at Caronge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian cone booms. Price for the whole 7¾d. per foot," The raft had been measured for the seller by a public officer, and his specification showing the contents of each log, and the total, had been given to the buyer before the contract. The raft *was delivered* to the buyer's servant, at the appointed place, and broken up by a storm the same night. The court held, in this case, that the property had passed, because the raft *had been measured before delivery* and it was not to be measured again by the seller. The buyer was at liberty to measure it for his own satisfaction. "By the law of England, by a contract for the sale of specific ascertained goods the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our courts as sufficiently indicating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf, the property will not be changed until he has done it or waived his right to do it."

Although the vendor has given a delivery order, or a dock-warrant, to a warehouse-keeper, wharfinger, or bailee having the custody of the goods, commanding him to deliver them to the purchaser yet, so long as the precise quality of goods to be delivered under the order has not been ascertained, and separated from the bulk, and put into a deliverable state, and placed at the disposal of the purchaser, the sale is not complete and the right of property is not altered[4].

Where there was a contract for the sale of a cargo it was held that no property passed and the buyer had no insurable interest in the cargo until the cargo was completely loaded, so that the shipping documents could be made out, this being a thing to be done by the seller in order to put the goods into a deliverable state[5].

The word 'something' in this section contemplates some act done directly to the goods and not merely an act done with reference

1 Simmons v. Swift, 5 B. & C. 857; 5 L. J. K. B 10; See also Hanson v. Meyer, 6 East, 614; 8 R. R. 572 (weighing), Zagury v. Furnell 2 Camp. 240; 11 R. R. 704 (counting): Logan v. LeMesurier, 6 Moo. P. C. 116; 79 R. R. 10 (measurement); Gilmour v. Supple, 11 Moo. P. C. 551; 117 R. R, 97 (measurement). See also Kursell v. Timber operators (1927) 1 K. B. 298.

2 Per Bayley J. in Simmons v. Swift, supra at p. 862.

3 11 Moo. P. C. 551; 117 R. R. 97.

4 Busk v. Davis. 4 M. & S. 395; Shepley v. Davis, 5 Taunt. 617.

5 Anderson v. Morice (1876) 1 App. Cas. 713.

to them.* So also the purpose of the act must be to put the goods in a deliverable state according to the terms of the contract. So the mere fact that the seller is to pay warehouse or wharfage rent for the goods[1], or that he is to pay custom duties[2], does not suspend the passing of the property, even though the seller retains the warrants of delivery for that purpose[3]. The principle of this rule applies also where a specific chattel, which is partially manufactured at the time of the contract is, by the contract, to be completed by the seller[4]; and where, subsequently to a contract for the manufacture and sale of a chattel, the parties agree that the specific partially manufactured chattel, and no other, shall be the subject matter of the contract.[5]

"Specific goods".

A contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, cannot be held to be a contract of sale of specific goods within the meaning of S. 21 above. The expression "specific goods". necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a store house or cask would not be capable of ascertainment until it was removed or separated. "Specific goods" would, according to their natural interpretation, mean goods whose delivery can be demanded *in specie*. A contract of sale of a small quantity of liquor stored in bulk would more appropriately be regarded as a contract for sale of unascertained goods and would fall under S. 23 of the Act. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling or the quantity of liquor ordered would be an act of ascertainment and apppopriation. Where the servant of a licensed vendor of liquor goes about canvassing order for liquors and gets orders from customers and thereafter gets the quantities so canvassed measured off at the shop of the vendor and carries the quantities to the respective houses of the customers it cannot be held that the sale is completed at the houses of buyers upon delivery of liquor and not before. Under S. 23 (2) of the Act, the servant of the seller can very well be treated as a bailee for the purpose of transmission to the buyer, and delivery to such servant at the place of the licensed vendor would be effective delivery to the buyer himself. It is immaterial whether the price of the liquor is paid at the shop of the vendor or at the house of the buyer, for the completion of the sale does not depend upon payment of the price of the goods sold. The sale must be taken to be completed within the premises of the licensed vendor and the latter cannot therefore be convicted under S. 45 (c) of the Bombay Abkari Act for contravention of a clause in his license prohibiting sale of liquor at any place except the licensed premises[6].

Notice to the buyer.

The section provides that the buyer must have notice that the seller has put them into a deliverable state. The section only requires

1 Hammond v. Andersen, (1803) 127 E. R. 384 ; see also Halsbury, 2nd Edn., Vol. XXIX. p. 85.
2 Hinde v. Whitehouse, 7 East. 558.
3 North British and Mercantile Ins. Co. v. Moffatt, L. R. 7 C. P. 25.
4 Laid[illegible] Turlinson, 2 M. & W. 602.
5 Wait [illegible]ier, 2 Exch. 1.
6 Emp[illegible] Kunverji Kavasji, A. I. R 1941 Bom. 106=194 I. C. 302=43 Bom. L. R. 95.

that the buyer must have notice and it is not insisted that notice should be given by the seller. It would appear that "notice" is equivalent to "knowledge".

Collateral acts

Where the act to be done is not for the purpose of putting the goods in a deliverable state, but for some other collateral purpose, such as paying warehouse charges, or duties, the passing of the property will not be delayed[1]. Thus in *Ramiah Asari* v. *Chidambara*[2] where an author sold the right to publish and sell a literary production, it was held that the mere fact that the author had undertaken to revise the work did not prevent the passing of property.

Intention of the parties to the contrary.

As in the case of the preceding section the rule in this section is only a *prima facie* rule, which is subject to any contrary intention appearing. Property in unfinished goods may pass if the goods are ascertained and pointed out with the intention of transferring ownership[3].

As the thing to be done by the seller is to put the goods into a *deliverable* state, it follows that *prima facie* the property in goods will pass, even though something remains to be done by the seller in relation to the goods sold, after their delivery to the buyer[4].

***22.** Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price

Specific goods in a deliverable state when the seller has to do anything thereto in order to ascertain price-scope of the section.

Generally speaking, to constitute a sale which shall immediately pass the property it is necessary not only that the thing sold should be ascertained, but that there should be a price ascertained or ascertainable. The parties may buy or sell a given thing, nothing remaining to be done for ascertaining it, but the price to be afterwards ascertained in the manner fixed by the contract of sale or on a *quantum valebat*[1]; or they may agree that the sale shall be complete and the property pass although the delivery of possession is postponed, and although something shall remain to be done by the seller before

1 Hammond v. Anderson, supra ; Hinde v. White-house, (1806) 103 E. R. 216, 8 R. R. 676 (duties payable).
2 (1920) 39 M. L J. 341=59 I. C. 229.
3 Young v. Matthews (1866) L. R. 2 C. P. 127 cited at p. 232.
4 Benjamin on Sale, 7th Edn., p. 330.

***Analogous law.**

Section 18, Rule 3 of the English Sale of Goods Act, 1893, which is the same as section 22 of the Indian Act.

Old section 81 of the Indian Contract Act, 1872, which was to the following effect :—

"Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done."

See section 9 of the Act.

the delivery; or they may agree that, nothing remaining to be done for ascertaining the thing sold, yet the sale shall not be complete and the property shall not pass before something is done to ascertain the amount of the price

This section lays down that where there is a contract for the sale of specific goods in a deliverable state, but the *seller* is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. The rule applies when the parties have agreed upon some data on which the price is to be calculated (*e. g* so much per ton or cub. feet) and the weighing, etc., involves the mechanical process of calculating the total amount of the price. But if the goods have been weighed, etc., the mere arithmetical calculation of the price may not defer passing of property. In *Tansley* v. *Turner*[1], there was sale of felled timber, lying on another's ground, the purchaser having the power of removing them when he pleased. The number of cubic feet in each tree was ascertained and the trees marked so as to show they belonged to the purchaser, but the several sums were not added into a total. It was held that the property and possession had passed to the purchaser. In *Simmons* v. *Swift*[2] a vendor sold the bark stacked at Redbrook at 9l. 5s. per ton of 21 cwt, to be weighed before delivery, and 8 tons 14 cwt. of the bark was weighed and delivered, but before the residue was weighed and the quantity thereof ascertained, a high flood arose and destroyed it. It was held that the right of property in the unweighed residue had not been altered, neither, consequently, had the risk of loss.

Where there was a sale of 289 specified bales of goatskins, containing five dozen in each bale, at a eertain price per dozen, but by the usage of the trade, it was the *seller's* duty to count the bales to see whether they contained the number specified in the contract and before the seller had done this the bales were destroyed by fire, it was held that the loss fell on the seller[3].

But the distinction must be observed between a sale by measure or weight requiring the measuring or weighing to be accomplished *for the purpose of determining and fixing the price*, and a sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty of the weight or quantity, where the weighing or measuring is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for[4]. The rule applies when the goods are in a deliverable state, so it does not apply when weighing etc. are necessary to put the goods into a deliverable state. Again, the rule does not apply when weighing, measuring etc. are necessary to ascertain the goods (*e.g.* separation from bulk) as in such cases there is no sale of ascertained or specific goods (see *Abdul Aziz* v. *Jogendra*, supra)

1 (1835) 2 Bing N. C. 151.
2 5 B. & C. 857; 5 L. J (O. S.) K. B. 10; 29 R. R. 438.
3 Zagury v. Furnell (1809) 2 Camp. 240, 11 R. R. 704. See also Martineau v. Kitching (1872) L. R. 7 Q. B. 436.
4 See Furley v. Bates (1863) 159 E. R. 83; 133 R. R. 839 cited at p. 236; Abdul Aziz v. Jogendra Krishna (1917) 44 Cal. 98.

In *Shoshi* v. *Nobo*[1] there was sale of rice to be weighed for satisfaction of the buyer, but so far as the vendors were concerned, nothing remained to be done on their part to the rice sold. Held that the property passed when the contract was made. In *Nanka — Bruce* v. *Commonwealth Trust Ltd.*[2] the seller was to consign cocoa to the buyer at a certain rate per lb. who was to resell the same to merchants and to transfer to them the Railway consignment notes. The merchants were to weigh up the goods at their premises and check the weights and the buyer would pay the seller according to the weights so checked. It was held that the checking of the weights by the merchants was not a condition precedent to the passing of the property." The goods were transferred, their price was fixed and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale or the condition precedent to it. To effect such suspension or impose such condition would require a clear contract between vendor and vendee to that effect."

In *Eldon (Lord)* v. *Hedley Bros.*[3] the contracts were for the sale of stacks of hay as standing on a farm subject to the right of the buyers to cut and tie into trusses the hay in the stack and to reject any part that turned out to be not 'good marketable hay clear of mould.' The buyers were to take delivery "when convenient" and the price was to be a price put free on rails. The court held that the contract was for ascertained or specific goods seen and identified by the buyers, and that the intention was that the property in the stacks should pass to the buyers at the date of the contracts. Greer L. J. said :

"The special terms of the contracts entitling the buyers to refuse to take delivery of or to pay for mouldy or unmarketable hay did not prevent the property from so passing, but only operated to enable the buyers though they had become the owners of all the hay in the stack, to refuse to take delivery and so revest in the seller any hay found to be mouldy or unmarketable at the time of delivery.

As regards the weighing of hay before delivery for ascertaining the price, Slesser L. J., said :

"It was further argued, that in so far as the seller would have to weigh the hay in order to ascertain the price, the property would not pass until the seller has so weighed the goods within the meaning of section 18, Rule 3, of the Sale of Goods Act, 1893......I do not think that this was a case, where after the price of the stacks had been fixed by tonnage and a sum expressed to be in part payment made that there remained such an obligation on the seller to weigh for the purpose of ascertaining the price as would bring the case within section 18, Rule 3 of the English Sale of Goods Act."

In *Hoe Kim Seing* v. *Maung Ba Chit*[4] there was a sale of paddy where the price and the quantity had been fixed and it required only a simple calculation to determine the total price, the ***buyer*** having to measure the paddy only in order to satisfy himself that he had not the quantity bargained for. It was held that the passing of the property was not delayed by reason of the fact that the measurement remained to be made.

In *Kanshi Ram* v. *Mul Chand*[5], where under the contract. it was the ***buyer*** who was to weigh the goods at the time of delivery

1 (1879) 4 Cal. 801 (805).
2 (1926) A. C. 77.
3 (1935) 2 K. B. 1.
4 A. I. R. 1935 P. C. 182=(1935) 62 I A. 242=14 Ran. 1=157 I. C. 891.
5 A. I. R. 1930 Lah. 469=127 I. C. 158.

and the seller had undertaken responsibility for any deficiency, it was held that the property had passed. Similarly, in *Dewa Singh* v. *Narain Singh*[1] where in payment of a debt due to the buyer, the latter was to take, at specified rates, all the bricks in the seller's kiln, the expenses of stacking etc. to be debited to the seller, it was held that as the seller had nothing more to do in connection with the sale, there was a completed sale and property passed to the buyer.

In *Hanson* v. *Meyer*[2] the defendant sold a specific parcel of starch at £6 per cwt, and directed the warehouseman to weigh and deliver it. After a part of the quantity was weighed and delivered, the purchaser became bankrupt. The seller thereupon countermanded the order for the delivery of the remainder and took it away. The assignee of the bankrupt purchaser brought an action for trover against the seller. The court held that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because the price was made to depend upon the weight.

Where timber was sold which was to be measured off before delivery and paid for accordingly, it was held that the property would not pass until it was measured, and the purchasers could therefore recover back the price paid for all timber not received by them and damages for breach of contract[3].

If by the terms of the contract the seller agrees to deliver the goods sold at a given place, and there is nothing to show that the goods are to be in the meantime at the buyer's risk, the contract is not fulfilled by the seller unless he delivers the goods accordingly, that is to say, the property would remain in the seller and the goods would remain at his risk[4].

It may be noted that the acts to be done with reference to the goods for ascertaining the price are confined to acts to be done by the *seller*. Thus, if the weighing is not necessary to fix the identity or price, and is only for the buyer's satisfaction, the property passes even though the goods have not been weighed[5].

This section assumes that the goods are already in a deliverable state, but some act requires to be done by the seller for ascertaining the price such as weighing, measuring, testing them. It has been observed that a merely mental act, such as counting the items of a specific lot of goods, would seem not to be "an act or thing" within the meaning of the section[6].

Unless a different intention appears.

The rule laid down in this section also is subject to the intention of the parties. If it appears by the terms of the contract that it

1 A. I. R. 1927 Lah. 894=103 I. C. 222; see also. In Re: David Sassoon & Co. (1926) Sind 246=95 I. C. 453.
2 (1805) 6 East 614; 8 R. R. 572.
3 Logan v. Le Mesurier (1847) 6 Moo. P. C 116; 79 R. R. 10.
4 The Calcutta Co. v. De Mattos (1863) 32 L. J. Q. B. 322, at 329; 139 R. R. 752, 762. See also Badische, etc. Fabrik v. Basle Chemical Works (1898) A. C. 200, at p. 207 in which a buyer in England had ordered goods to be sent by post from Switzerland.
5 Swanwick v. Sothern (1839) 9 A. & E. 895; 48 R. R. 740; Gilmour v. Supple (1858) 11 Moo. P. C. 551; 117 R. R. 97.
6 Halsbury, Laws of England, 2nd Edn. Vol. XXIX, page 86, fn. (x).

was the intention of the parties that the property should pass to the buyer, it will pass, although the goods have still to be weighed, measured or tested, provided the subject matter of the sale is ascertained[1]: and there may be a complete contract so as to pass the property in the goods, although the price has not been definitely agreed on[2], or although the goods are still unfinished[3], or unweighed[4].

The fact that the parties have agreed upon a provisional estimate of the price of the goods, the actual amount whereof is to be afterwards more exactly calculated, is relevant to prove a common intention that the transfer of the property shall not depend upon the final adjustment of the price[5].

Agreement remains executory until the condition is fulfilled.

Whether the condition precedent to the passing of the property is one which is implied, or is expressly made by the parties, its effect is the same, the property does not pass till the condition is fulfilled. As observed by Blackburn[6] "in the interval between the making of the agreement and the fulfilment of those conditions on which the property is to vest, the buyer has no interest in the thing itself, and it follows as a necessary consequence that, if in the interval a third party has fairly acquired an interest in the chattel, the buyer cannot on the fulfilment of the conditions deprive him of it. He may have a remedy against the seller for breaking his agreement, by suffering this interest to be created, but he cannot take the property in derogation of a right acquired, whilst the agreement was only executory and he had no interest in the goods but only a choice in action."

Notice to the buyer.

This section also requires notice to the buyer when the seller has performed the condition precedent to the passing of property. It is clear that in order to pass the risk (and so the property) to the buyer he must have notice of it, for in that case he might take proper steps to protect his rights. This is not possible unless he has notice.

Sale of unascertained goods and appropriation.

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

Delivery to carrier.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other

1 Furley v. Bates, supra ; Martineau v. Kitching, L. R. 7 Q. B. 436 ; 41 L. J. Q. B. 727.
2 Joyce v. Swann, 17 C. B. N. S. 84.
3 Young v. Matthews, L. R. 2 C. P. 127 ; 36 L. J. C. P. 61.
4 Martineau v. Kitching, supra.
5 Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 86 ; Martineau v. Kitching, supra.
6 Blackburn on Sale, 2nd Edn., p. 196.

bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Analogous law.

This section follows section 8 rule 5 of the English Sale of Goods Act, 1893. See Appendix A. See also sections 79,83 and 84 of the Indian Contract Act, 1872 (Appendix B) since repealed.

Executory agreement converted into sale by subsequent appropriation.

After an agreement to sell has been made, it may be converted into a complete sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of goods specifically to the contract. For example, suppose A sells out of a stack of bricks one thousand to B, who is to send his cart and *fetch* them away. Here B is to do the first act, and cannot do it till the election is determined. He, therefore, has authority to make the choice, but he may choose first one part of the stack and then another. and repeatedly change his mind until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away ; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A should *load* the bricks into B's cart, A's election would be determined as soon as that act was done, and not before[1].

Sir Mackenzie Chalmers observes[2] on this point as follows :—

"When there is a contract for the sale of unascertained goods, and the goods are afterwards selected by the buyer, or if selected by the seller are approved by the buyer, no difficulty arises. The difficulty arises when the seller makes the selection pursuant to an authority derived from the buyer; and it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or whether they show an irrevocable determination of a right of election. The general rule seems to be that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement: when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.[3]"

In determining whether the selection is final or not the courts will consider the external actions of the parties and will not enter into an enquiry as to their actual state of mind.[4]

When the goods to be delivered under the contract have been identified, in a manner binding on the parties, as the goods on which the contract is to attach, and therefore as the goods in which the property is to be transferred to the buyer. and nothing further remains to be done to pass the property, the property may, and, in

1 Benjamin on Sale, 7th Edn., p. 530. See also illustration to repealed S.84 of the Indian Contract Act (Appendix B).
2 Sale of Goods Act, 11th Edn., p. 68.
3 Blackburn on Sale, 1st Edn., p. 128 2nd Edn. 130.
4 Smith v. Hughes (1871) L. R. 6 Q. B. 597, 607.

the absence of a contrary intention, will pass: nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for, as has already been explained, the right of the seller to retain possession of the goods until payment is quite consistent with the change of property. It is this which is described in the section as an unconditional appropriation of the goods in a deliverable state to the contract by one of the parties with the assent of the other.

Meaning of "appropriation"

The word "appropriation" has not been defined by the Act but it involves acts such as separation or selection of goods from the bulk either by weighing, measuring or counting for the purpose of satisfying a particular contract, and before there is the assent of the buyer the seller may change his mind as often as he likes and allot any goods he chooses to a particular contract; but once the buyer gives his assent to a particular act of appropriation by the seller it is irrevocable, and both the seller and the buyer are once for all bound by it. The property passes on the giving of such assent by the buyer. Ordinarily the appropriation is made by the seller and the buyer subsequently assents to it, and then the property passes.

Appropriation—essentials.

1. The goods should *conform* to the description in the contract. The appropriation shall be of goods "of the description" contracted for, and "in a deliverable state." In *Vigers* v. *Sanderson*[1] there was a contract for two parcels of swan laths of specified lengths, and it was provided that property should pass on shipment: and that if any dispute arose under the stipulation in the contract, the buyers were not to reject any of the goods but the dispute was to be referred to arbitration; but as it happened that the goods supplied were not of the contract description, it was held that no question of the passing of property arose at all. In *Levy* v. *Green*[2] the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware teapots, dishes and jugs, to which the plaintiff had added other earthernware articles of various patterns not ordered. It was unanimously held in the Exchequer Chamber that the property had not passed, and that the purchaser had the right to reject the whole.

2. The goods must be in a *deliverable* state. Thus, shipment of part of the goods where the contract was indivisible did not pass the property in the goods shipped[3].

3. They must be ***unconditionally appropriated*** to the contract.

Sub-section (2) of the present section defines what is unconditional appropriation. The essence is that there is no reservation on the part of the seller of the *jus disponendi*[4]. If, for instance, it

1 (1901) 1 K. B. 608, see also Buch & Co. v. Gordhandas A. I. R. 1923 Bom. 95; cf. Cunliffe v. Harrison (1851) 155 E. R. 813; 86 R. R. 543 (Order for ten hogsheads of claret--fifteen sent—no specific appropriation)

2 1 E. & E. 969; 27 L. J. Q. B. 111; 28 L. J. Q. B. 319; 117 R. R. 552.

3 Sadasook v. Chaitram, (1924) 29 C. W. N. 808.

Ford Automobiles v. Delhi Motor Engineering Co. A. I. R. 1923 Bom. 125; cf. Nripendra Kumar Bose, In re, A. I. R. 1930 Cal. 171=56 Cal. 1074; Campbell v. Mersey Docks and Harbour Board (1863) 143 E. R. 506; 135 R R. 752. See also Juggernath v. Smith, (1907) 34 Cal. 173.

is conditional on payment of the price, there is no appropriation within the meaning of the section. An executory agreement to sell unascertained goods will become a sale by a sebsequent unconditional appropriation of them to the contract. Thus in *Shankar Das* v. *Bhand Ram*[1] where the sellers who had contracted to sell oil, and had received the price therefor, subsequently received from their vendors a railway receipt for the goods, and endorsed them to the buyers, it was held that the property had passed to the buyers and the risk of destruction in transit lay with him.

4. The appropriation must be either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The assent may be express or implied, and may be given either before or after the appropriation is made.

If the commodity was selected in bulk by the purchaser, the ownership and risk pass as soon as the quantity sold has been separated from the mass and tendered to the purchaser or placed at his disposal[2]. If the bulk of the commodity bought and sold has not been selected by the purchaser in the first instance, the sale may be rendered complete, so as to operate as a transfer of the property and risk, by a subsequent selection by the vendor and approval by the purchaser, such subsequent selection and approval being the same as if the article had been fixed upon in the first instance[3]: but a selection by the vendor only without the approval of the purchaser will not transfer the property in the goods so selected[4]. If the article is to be selected by the vendor, but the purchaser makes its acceptance dependent upon his approval of it as regards workmanship, convenience, or taste, the latter will be entitled to reject it, if it does not meet his approval upon some one or more of the grounds stated[5]. When everything that the seller is to do to complete the sale has been performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of possession of the subject-matter of the sale, or perfect control over it, by reason of the non-performance of some act to be done exclusively by him[6]. But it is not competent to the buyer to perfect the contract and vest the property in himself by the performance of acts which it is the duty of the vendor to perform, unless the acts are done by the authority of the vendor[7].

Assent

The assent may be express or may be inferred from the conduct of the buyer. Thus, though the buyer may assert that the goods are not of the contract quality assent may be inferred from his conduct, *e. g.* by a reference to arbitration[8]. The buyer's conduct in paying

1 A. I. R. 1926 Lah. 606—7 Lah 406=97 I. C. 765.

2 Rugg v. Minett, 11 East, 210. Simmons v. Swift. 5 B. & C. 857: Aldridge v. Johnson, 7 E. & B. 885; Langton v. Higgins, 4 H. & N. 402; Langton v. Waring, 18 C. B. (N. S.) 315.

3 Rohde v. Thwaites, 6 B. & C. 388; Sparkes v. Marshall, 2 Bing. N. C. 761, 5 L. J. C. P. 286.

4 Jenner v. Smith, L. R. 4 C. P. 270; Campbell v. Mersey Docks, 14 C. B. (N. S.) 412.

5 Andrews v. Belfield, 2 C. B. (N.S.) 779.

6 Rugg v. Minett, supra: Furley v. Bates, 2 H. & C. 200: Sweeting v. Turner, L. R. 7 Q. B. 310.

7 Acraman v. Morrice, 8 C. B. 449; 19 L J. C. P. 57. For general principles see also Lord, Coke's discussion in Heyward's case, and adopted in Comyns' Digest, Election.

8 Finlay Muir & Co. v. Radhakissen (1909) 36 Cal. 736, 744.

custom duty and godown rent was held amounting to an assent to the appropriation.[1]

Illustrations.

(*a*) Goods answering the description in a contract were manufactured by the vendor and by him appropriated to the contract, and the purchaser on being informed of it directed the vendor to mark and despatch them for shipment according to certain instructions, and the goods were marked and despatched from the vendor's mill, but could not be shipped, as the vessels named by the purchaser were not available at their usual place: *Held*, that the property in the goods passed to the purchaser and he was liable in damages for declining to take delivery of the goods. "The act of despatching the goods from the mill was... ..the act of the defendant (*i.e.* the purchaser) through his agents, the plaintiffs, and this act of the defendant constituted an *implied* assent to the appropriation by the plaintiffs, which then became no longer revocable[2]."

(*b*) A contracted to sell to B 1,999 bales of jute, the goods to be placed alongside S. S. "Uganda," and to be paid for in cash against the mate's receipts. The goods were marked by A with B's private mark pursuant to B's instructions, and they were placed alongside the vessel, and shipped in due course. The mate's receipts were made out in B's name, and A sent them on to B, together with his bill for the receipts for bills of lading, and pledged them with C, who advanced the money in good faith. B became insolvent. A sued C for the price of the goods alleging that the property in the goods did not pass to B, and B therefore could not make a valid pledge thereof: *Held*, that the property in the goods passed to B, the above facts affording sufficient evidence of an appropriation by A of the goods to the contract and of B's assent to the appropriation. *Held*, further, that a clause in the contract, that if B retained the mate's receipts without paying for the goods the receipts should be deemed to be the property of A until B paid for the goods, did not render the appropriation conditional only. The effect of that clause was, it was said, not to reserve the *jus disponendi* in A, but to provide him with a security for due payment of the price of the goods by empowering him to hold possession of the mate's receipts, and so to prevent B from dealing with the goods until the price was paid[3].

(*c*) B sends an order from Madras to A, a manufacturer at Calcutta, for certain goods "to be dispatched on insurance being effected". A packs goods according to the order in a cask marked with B's initials and ships it from Calcutta to B, having insured the goods in B's name. The goods become B's property as soon as they are dispatched from Calcutta[4].

(*d*) In *Jenner* v. *Smith*[5], A contracted to sell to B 100 maunds of grain, according to a sample produced, out of a larger bulk which

1 Bach & Co. v. Gordhandass (1922) 24 Bom. L. R. 991.

2 Clive Jute Mills Co. v. Ebrahim Arab (1896) 24 Cal. 177, 182.

3 Juggernath Augurwallah v. Smith (1906) 33 Cal. 547.

4 Fragano v. Long (1825) 4 B. & C. 219. 28 R. R. 226.

5 (1869) L. R. 4 C. P. 270 Compare Healy v. Howlett & Sons (1914) 1 K. B. 337.

B had not seen, and which was already in sacks of A's. A marked a certain number of these sacks with B's name and the words "To wait orders." *Held*, the sacks so dealt did not become B's property in the absence of specific assent from B, or previous authority from B to A to select them on B's behalf.

(*e*) In *Rohde* v *Thwaites*[1] the buyer bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the seller. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated by the seller, who gave notice to the buyer to take them away, which the latter promised to do. *Held*, that this was an implied subsequent assent to the appropriation of the sixteen hogsheads; that the contract was thereby converted into a sale, and the property passed.

(*f*) The plaintiff agreed to take from K 100 quarters of barley out of the bulk, which he had inspected and approved, in K's granary at £2 3s. a quarter, in exchange for thirty-two bullocks, at £6 a piece, the difference to be paid to K in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which *K was to fill*, to take to the railway, and to place upon trucks free of charge. Plaintiff sent 200 sacks. K filled 155 sacks, but could not succeed in obtaining trucks. The plaintiff requested that the 155 sacks should be sent to him and K assured that it would be put on the rail that day, but this was not done. K finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again. It was held that the grain put in the sacks became B's property as each sack was filled, and did not cease to be so by A's subsequent wrongful dealing with it[2].

(*g*) In *Langton* v. *Higgins*[3] there was a contract for all the oil to be produced in one year's crop of peppermint on A's farm. When the crop was got in and the oil ready, A put in into bottles furnished by B. It was held that there was an appropriation and assent and that the property passed to the buyer.

(*h*) When the seller sends notice of appropriation to which the buyer does not reply, property is deemed to pass on the expiry of a reasonable time after receipt of notice. B orders 140 bags of rice from A, pays for them and asks for delivery. A sends him a delivery order for 125, and asks him to send for the remaining 15 at A's place of business. B waits a month before sending for them, and in the meantime they are stolen. The property in the 15 bags has passed to B, and he must bear the loss[4].

(*i*) A in England writes to B at Basle in Switzerland for a packet of patent dye, to be sent by parcel post. B posts the packet to A. The property passes to A as soon as the packet is posted in Basle[5].

1 6 B. & C. 388; 5 L. J. (O. S.) K. B. 163; 30 R. R. 363.
2 Aldridge v. Johnson (1857) 7 E. & B. 885, 110 R. R. 875.
3 (1859) 157 E. R. 896; 118 R. R. 515.
4 Pignataro v. Gilroy & Son, (1919) 1 K. B. 159. For converse case, see Healy v. Howlett & Sons, (1917) 1 K. B. 387. See also Nath Mal v. Jugal Kishore, A. I. R. 1929 Lah. 268.
5 Badische Anilin Fabrik v. Basle Chemical Works, (1898) A. C. 200, at pp. 203, 204.

(*j*) K consigned a waggon load of lime and sold the consignment to the firm M. M paid portion of the purchase money and the remaining portion was to be paid on weighing of the lime according as the weight was more or less. The lime did not reach its destination till 14th March 1920, the contract being entered into on 9th February 1920. M found that the lime was damaged in transhipment and was less in weight. M did not make any further payment and K instituted suit against him for the balance of the purchase money. *Held*, that the property in the lime had passed to M on 9th February 1920 and any loss subsequent to the date was to be borne by M[1].

(*k*) The broker hands the certificates to the buyer, together with transfers signed in blank by the registered holders. The shares are ascertained, the sale is complete and the property has passed to the buyer[2].

(*l*) In *Gulab Rai* v. *Nirbheram*[3] where the seller forwarded the Bill of Lading with a Bill of Exchange attached, with directions for delivery of the former only on the acceptance or payment of the Bill of Exchange, it was held that the appropriation which was conditional became final when the draft was accepted[4].

(*m*) Where the buyer rejects the goods that they are not of contract quality (though they are so in fact) there is no assent. In *Yule & Co.* v. *Mahomed*[5] the seller tendered certain bales of contract quality but the buyer refused to accept them on the ground that they were wrongly marked and so were not in terms of the contract. It was held that as the bales were at once refused by the buyer the property in the goods did not pass to him but remained in the seller in the same way as it was vested in him before the temder.

(*n*) When the goods have been rejected by the buyer it is open to the seller to make another election within the contract time, for until a particular election has been assented to by the buyer it is not final. But the buyer is not bound to accept an election after the contract period has expired[6].

(*o*) The question of appropriation is a question of fact, and the law does not require any particular mode or form of appropriation. In *Maradugala* v. *Kotala*[7] the property in timber was held to pass as soon as it was cut.

Blackburn has observed on this point as follows :—

"The difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, unless it was made in pursuance of an authority to make the election

1 Kanshi Ram v. Mul Chand Bhagwan Das, A. I. R. 1930 Lah. 469= 127 I. C. 158 ; A. I. R. 1926 Lah. 606 supra followed.
2 Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co. A. I. R. 1926 (P. C.) 38=50 Bom. 160=94 I. C. 824.
3 A. I. R. 1924 Lah. 239=4 Lah. 423= 79 I. C. 194.
4 Blackburn on Sale, 2nd Edn. pp. 129-130.
5 (1897) 24 Cal. 124. See also Wait v. Baker (1848) 2 Exch. 1, 10.
6 Burrowman v. Free, 48 L. J. Q. B. 65.
7 21 M. L. J. 413.

conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.

"The question of whether there has been a subsequent assent or not, is one of fact: the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of nicety.

"The general rule laid down by Lord Coke in *Heyward's* case[1], and adopted in Comoyns' Digest, *Election*, seems to be that when from the nature of an agreement an election is to be made, the party, who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

"It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to dispatch the goods, or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement and, in Lord Coke's language, 'the certainty, and thereby the property begins by election'[2]; but however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him."

It may be notet that where both parties have subsequently assented to the appropriation of some specific goods to fulfil the agreement, no difficulty arises. The effect is then the same as if they had from the first agreed upon the sale of those specific goods. The selection of the goods by the one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes[3].

Appropriation with the previous assent of the buyer

If there is previous assent by the buyer subsequent appropriation or selection by the seller passes the property at once. As has been stated above, there must be the selection of goods, by one party and the adoption of it by the other party but the order may vary. Thus if the authority to select is conferred by the contract on the seller, as soon as the selection is made, property passes to the buyer[4]. Previous authority to appropriate may be withdrawn before it is exercised and if the seller inspite of that appropriates, property does not pass and the seller cannot sue for price but he can sue for damage for non-acceptance.

Appropriation by mistake

If there is neither previous authority nor subsequent assent to appropriation, the property does not pass[5]. So too, if a mistake is made in the appropriation[6]. A common mistake as to the identity of the goods appropriated is, of course, ineffectual. Thus, where a buyer bought a quantity of goods at auction under the denomination of class 2, and certain packages were subsequently appropriated, by both parties as the buyer's purchase, whereas they contained, unknown to the parties, goods of class 1, it was held that no property

1 2 Co. Rep. 36 A.
2 Heyward's case, supra.
3 See Rohde v. Thwaites, supra p. 393. per Holroyd J.
4 Guth v. Lees, 3 H. & C. 558, See Chalmers p. 68.
5 See Jenner v. Smith supra.
6 Campbell v. Mersey Docks and Harbour Board (1863) 143 E. R. 506 135 R. R. 752.

passed to the buyer[1]. But where a common intention to appropriate exists, a mistake by the agent receiving the goods as to the particular buyer for whom they are delivered is immaterial. Thus where each buyer of 500 quarters of oats out of a cargo sent the same lighterman to receive the parcels, and the lighterman intended to take delivery for S and D respectively, whereas the shipping clerk delivered on behalf of D and S respectively, and the parcel which the seller intended to deliver to S was lost, it was held that as both D and the seller intended the parcel received by the lighterman for S to be appropriated to D, D was entitled to it[2].

Delivery to a carrier—sub-section (2).

"The commonest form of appropriating goods to the contract is by delivering them to a carrier. and then, if there be authority so to deliver them, and the seller does not reserve the right of disposal, 'the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and the vendee, either by note in writing, or part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract.[3]"

In order to come within the rule laid down in sub-section (2), there must be (i) delivery in pursuance of the contract, *i. e.* in the manner indicated and of goods of the description in the contract; (ii) delivery should be to the buyer (iii) or to a carrier or other bailee for transmission to the buyer, and (iv) the seller does not reserve the right of disposal.

Passing of property on delivery

Sub-section (2) recognizes an important principle, *viz*, that, where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. The rule is, however, silent as to the passing of property to effect which there should be previous or subsequent assent of the buyer. In cases where the buyer asks the seller to send the goods by a common carrier, (whether by sea or by rail) it has been held that the buyer's assent to the appropriation is already given to the seller and that when the seller despatches the goods and delivers them to the common carrier for the purposes of transit to the buyer, the common carrier not only receives the goods as agent of the buyer, but also assents to the appropriation made by the seller[4]. If the intention finally to appropriate is clearly indicated, and the carrier assents, it is immaterial by what documents

1 Harvey v. Harris, 112 Mass, 32.
2 Denny v. Skelton (1916), 115 L. T. 305.
3 Chalmers, Sale of Goods Act, 1893, 11th Edn. p. 69; Wait v. Baker (1848), 2 Exch. 1, at p. 8 (unindorsed bill of lading); Napier v. Dexters, Ltd. (1926), 26 L. I. L. Rep. 62.
4 Colonial Insurance Co. v. Adelaide Insurance Co. (1886) 12 A. C. 128 (Buyers chartered ship-delivery on board is delivery to buyer); Studdy v. Sanders (1826) 108 E. R. 234 (Delivery to buyer's servant); Fragano v. Long (1825) 107 E. R. 1040; 28 R. R. 226; Dutton v. Salomonson (1803) 3 B. & P. 582; 7 R. R. 883.

the consignment is effected[1]. When goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off, though there may be a provision that they are to be paid for after arrival[2].

The rule, however, applies only where the carrier is, as he generally is, the buyer's agent to take delivery. If the facts show, as, for example, where the seller exercises a right of disposal[3], or where he agrees to deliver the goods at their destination[4], that the carrier is the seller's agent, delivery is not a final appropriation. In such cases under the Act *"a different intention appears"*.[5] In *Louis Dreyfus & Co. Ltd. etc.* v. *South Arcot Groundnut Market Committee* etc[6], under a contract it was provided that the vendor should send the goods to the godowns of the purchaser at the place C and gave the purchaser the power of inspection and rejection. Though an advance was paid, the balance of the purchase money was to be paid on accepting the goods or the advance was to be refunded on rejection. The delivery was to be completed at place C. It was held that the sale and purchase were at C, and that by the mere handing over of the goods to railway authorities the goods did not become unconditionally appropriated to the contract.

The property would not pass on delivery if the passing of property is conditional. Thus, if the contract provides that the property is not to pass to the buyer until he has actually received the goods, or examined or approved of them, delivery to a carrier does not pass the property.

Delivery must be in pursuance of the contract.

The delivery must be "in pursuance of the contract," that is to say, it must be by the route prescribed. Thus, where the contract provided for a sea carriage from the part of loading to New York, the tender of goods which were sent part of the way by rail was held not to be a good tender, and the buyers were held entitled to reject the goods[7]. Similarly, if the buyer names the carrier, the seller does not duly pursue his authority to appropriate if he delivers to another carrier[8].

It has been held by the Madras High Court that delivery to the railway company by taking a railway receipt in the risk note form is delivery to the buyer[9]. But where the goods were consigned by railway, but the railway receipt was taken in the consignor's name, it was held that there was no appropriation[10].

Delivery to the buyer may not pass the property if the seller reserves his right of disposal. *See notes under section 25 post.*

1 Bryans v. Nix (1839) 4 M. & W. 775, at 791 ; 51 R. R. 819, 833.
2 Fragano v. Long (1825) 4 B. & C. 219 ; 28 R. R. 226.
3 See section 25 of the Act.
4 Badische Anilin und Soda Fabrik v. Basle Chemical Works (1898) A. C. 200 ; 67 L. J. Ch. 141, (cf) Sadasook v. Chaitram, A. I. R. 1926 Cal. 218=88 I. C. 910.
5 See Benjamin on Sale, 7th Edn. p. 358.
6 A. I. R. 1945 Mad. 383.
7 In re Sutro and Heilbut (1917) 2 K. B. 348, at p. 357.
8 Ullock v. Reddelein (1828), Dan. & L. I. 6 ; 39 Digest 574.
9 Alagappa v. Roopchand, A. I. R. 1929 Mad. 685=117 I. C. 136.
10 Billimoria v. Gouri Mal, A. I. R. 1928 Lah. 481=115 I. C. 457; Sundar Singh v. Gulab Singh, A. I. R. 1927 Lah. 269=100 I. C. 795.

As to the meaning of delivery, see sec. 33 post.

Goods to be manufactured—unfinished ships etc.

A man may purchase a chattel whilst in process of making: or he may agree to purchase it when made[1]; whether he does the one thing or the other depends on the intention of the parties. In the latter case *i. e*, where a specific chattel is ordered to be made, *prima facie* the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is completed and made ready for delivery, and has been approved of by the purchaser, or some person appointed on his behalf to inspect the materials and workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress, although the purchasemoney may have been paid in advance[2], but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the description contained in the contract[3].

But parties may agree that property in the goods should pass even before they are completed, or at a certain stage. It is a question depending upon the construction of the contract at what stage of the manufacture of an article the property therein is intended to pass, and a question of fact whether that stage has been reached[4].

As regards contracts for the building of such things as ships, where the price of a ship in course of construction is payable by instalments, a special rule of construction is established by the English authorities, *viz*., that the property in the unfinished ship passes on payment of the first instalment and subsequent additions become the buyer's property as they are worked into the ship, (subject in all these cases, to evidence of a contrary intention), and that despite the fact that the article is not in a deliverable state. The payment of instalments is held "to appropriate specifically to the buyer the very ship so in progress, and to vest in him a property in that ship[5]". This, however, is only a rule of construction and no rule of law[6].

"The result of the rule stated above is that as between the buyer and the builder, the buyer is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other"[7], and this has long been taken as a settled rule[8].

This rule, however, does not extend to auxiliaries intended to belong to the ship, not forming part of the structure such as engines, before

1 Laidler v. Burlinson, 2 M. & W. 602; 6 L. J. Ex. 160.
2 Mucklow v. Mangles, 1 Taunt. 318.
3 Atkinson v. Bell, 8 B. & C. 277; 6 L. J. (O. S.) K. B. 258; Laidler v. Burlinson, supra; Elliott, v. Pybus, 4 Moo. & Sc. 389, 397; 3 L. J. C. P. 182.
4 Per Lords Blackburn and Bramwell, 11 A. C. at 370, 385 (Seath v. Moore).
5 Woods v. Russell (1822) 5 B. & Ald. 942, 946.
6 See Clarke v. Spence (1836) 4 Ad. & E. 448; 43 R. R 395; Laing v. Barclay, Curle & Co. (1908) A. C. 35. See also In re Blyth Shipbuilding and Dry Docks Co. Ltd. (1926) Ch. 494, C. A., reviewing all the cases.
7 Woods v. Russell, supra.
8 Mellish, L. J., in Ex-parte Lambton (1875) L. R. 10 Ch. App. 405, 414.

they are fitted in the vessel and approved as parcel of it[1]. Lord Watson observed in *Seath* v. *Moore*[2] :

"Materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as sold, unless they have been affixed to or in a reasonable sense made part of the corpus."

Where the purchaser has paid part of the instalments by accepting bills drawn by the vendor, which have been discounted with third parties, and the purchaser and vendor subsequently become bankrupt, the holders of the bills have no lien on the ship if the bills are dishonoured[3].

It is not absolutely necessary that there shall have been in the original contract a stipulation for payment by the instalments, or that the instalment has actually been paid. The absence of these considerations might be supplied by the other circumstances from which the inference could be drawn. There must, however, always be facts admitted or proved sufficient to warrant the inference that the purchaser has agreed to accept the completed portion of the ship in part fulfilment of the contract of sale[4].

As already observed, it is a question depending upon the construction of the contract at what stage of the manufacture of an article the property therein is intended to pass, and a question of fact whether that stage has been reached. In *Sir James Laing & Sons* v. *Barclay Curle & Co*[5]. certain ships were to be built for an Italian company, but the contract provided that the vessels were not to be considered as delivered to, and finally accepted by the purchasers until they had passed certain official trials. Payment was made by the purchasers in instalments and the ships were arrested for a debt due from them. It was held that the contract was for a completed ship, that the risk lay with the builders till delivery, and there was no intention to part with the property until the vessels were completed.

Where the seller has to incorporate with his own materials with those of the buyer, the materials become the property of the buyer as soon as they are incorporated with the goods belonging to the buyer. Before incorporation the seller may select any material for the purpose but there is no final election unless they are incorporated, so until then the property does not pass. Where the contract is not for the sale and purchase of goods as moveables, but to make up materials and fix them until they are fixed, by the very nature of the contract the property will not pass. In *Tripp* v. *Armitage*[6], property was held not to pass in certain wooden sashframes which were not fixed to the building though approved by the supervisor.

The presumption or inference referred to above will not arise

1 Wood v. Bell (1856) 6 E. & B. 355, 103 R. R. 749, Ex. Ch. Reid v. Macbeth and Gray (1904) A. C. 223 ; In re Blyth Shipbuilding and Dry Docks Co., Ltd., supra.

2 (1886) 11 App. Cas., at 381.

3 Ex-parte Lambton, supra.

4 Laidler v. Burlinson (1837) 2 M. & W. 602, 46 R. R. 717 ; Seath v. Moore, supra.

5 (1908) A. C. 35, H. L.

6 (1839) 4 M. & W. 687.

in the case of machinery or materials to be fitted to a ship which is already in existence[1].

Chattels other than ships.

The principle enunciated above is not confined to ships; it seems that "the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state[2]." There may be a contract for the sale of the component parts of a whole structure or the like as parts, coupled with a contract that the seller shall put them together after delivery to the buyer. Here the parts as delivered are appropriated to the contract and become the buyer's property[3].

Appropriation—when final.

The question as to whether appropriation once made by the seller is final or whether it is revocable and he has got the right to further appropriate other goods answering the despeription within the time limited for performance sometimes arises. It has been held in *Reuter* v. *Sala*[4] that if the seller is still in time and the buyer is not prejudiced, it is open to the seller to make a fresh election and appropriation. Otherwise, an appropriation once made is final[5].

"When the party authorised has determined his election by doing such act or thing, the appropriation is finally made. Until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable, unless it has, previous to its revocation, been assented to by the other party. The question whether any act or thing done with reference to the goods is a final determination of an election to appropriate, or merely indicates a revocable intention to appropriate, is one of law[6].

In *Bailey, Son & Co.* v. *Smyth & Co. Ltd*[7]. there was a contract for the sale of 15,000 units of corn and there was a term that there should be separate documents for each 1,000 units and each 1,000 units should be considered a separate contract. The sellers gave notice of appropriation of 15,444 quarters and sent 16 invoices for 1,000 each and and one for 444. The buyers having rejected, the seller on the same day sent an amended invoice for 15,000 quarters with separate Bill of Lading for 1,000 quarters. It was held that the contract originally single and indivisible became 15 separate contracts on appropriation and that the amended provisional invoice had the effect of withdrawing the first tender and was a good tender.

Though no doubt a defective declaration might be cured by a second declaration if in time, if each declaration by itself is bad, the two cannot be read together to form a good declaration. In *Aure* v. *Van Cauwenberghe & Fils*[8] there were three declarations one after the other as each was found bad and the argument that the second

1 Anglo-Egyptian Navigation Co. v. Rennie, L. R. 10 C. P. 271, at pp. 280, 281.
2 Seath v. Moore supra, p. 385.
3 Pritchett & gold etc. Co. v. Currie, (1916) 2 Ch. 515, C. A.
4 (1879) 4 C. P. D. 239 (C. A.).
5 Grain Union Co. v. Mans Larsen (1934) 150 L. T. 78; 49 T. L. R. 540 (goods shipped per Triton—notice of appropriation erroneously given as per Iris. Held, notice final and buyer can reject).
6 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 78.
7 (1939) 1 A. E. R. 115.
8 (1938) 2 A. E. R. 300.

and third declarations between them constituted a valid declaration was rejected by the court.

Goods unascertained—agreement between parties that seller will have right of resale against buyer on breach and to recover godown and insurance charges etc., although goods have not been appropriated by either party—seller is entitled to recover these charges, although goods have not been appropriated.

Although in a contract of sale relating to unascertained goods, there is no right of resale or the right to recover insuring and warehouse charges etc., so long as the goods are not appropriated, it is open to the parties to agree as between themselves that in spite of the fact that the property in goods has not passed, there having been no appropriation by either of them of the goods towards the contract, the seller will have the right of resale against the buyer in breach and also to recover the godown rent and cost of insurance etc. and where such agreement exists the seller is entitled to recover the godown and insurance charges etc. It is always open to the parties to agree to terms under which the question of appropriation or the passing of the property to the buyer would not arise[1].

Present sale of future goods—goods in potential existence.

As has already been noticed, where there is a contract purporting to be a present sale of future goods, and, when the goods come into existence or are acquired, the seller delivers them to the buyer, or otherwise appropriates them to him, or the buyer takes possession of them by the authority, given by the terms of the contract or subsequently thereto, of the seller, the property in the goods is thereupon transferred to the buyer[2].

"Where, however, the future goods are such as have, at the date of the contract, a potential existence, the property in them is *prima facie* transferred to the buyer when they came into existence, so as to be capable of identification, without any further act of appropriation.

"Goods are in potential existence when they are the natural product, or expected increase, of something owned or possessed by the seller at the time of the contract, such as the hay or wheat to be grown in his field, the wool to be clipped from his existing sheep, the milk to be given by his existing cows, the young to be produced by his existing animals, and similar products.

"Where, however, the subject-matter of the contract is a product to be made or manufactured out of potentially existing future goods, a subsequent act of appropriation when the goods come into actual existence is *prima facie* necessary[3]."

Contract for a quantity of goods.

Under a contract for the sale of a quantity of goods the question whether the property in any part of the goods passes before the

1. Sheo Narain Gopi Ram v. New Sevan Sugar & Gur Refining Co. Ltd. etc., A. I. R. 1938 All. 272.
2. See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 79.
3. Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 80.

full quantity is made up depends upon whether successive appropriations of separate portions of the goods were contemplated, or whether the goods were contracted for only as an indivisible whole, to be appropriated as such[1].

The fact that the contract contemplates symbolic delivery of the goods as a whole by the transfer to the buyer of a bill of lading, or other document representing the whole quantity, is relevant to show that the goods were contracted for as an indivisible whole[2].

The fact that successive instalments of goods are deliverable to the buyer during a period of time, especially when the earlier instalments would be consumed or otherwise dealt with before the completion of the full quantity, is relevant to show that the instalments were intended to be separately appropriated[3].

See also notes under section 38 of the Act.

Where, by the terms of the contract for unascertained goods, the seller agrees to deliver the goods at a particular place and no intention appears in the contract that the property shall pass previously to such delivery, the property does not pass unless and until delivery is made accordingly[4].

Goods sent on approval or "on sale or return"

24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

This section follows rule 4 of section 18 of the English Sale of Goods Act, 1893. The Indian Contract Act, 1872, did not contain any similar rule although the principle involved herein was referred to in the illustration (b) to section 78—See Appendices A and B.

Goods delivered on approval, "sale of return" or other similar terms.

When goods are sold under a contract of 'sale or return' or on approval or on other similar terms, the sale is a conditional sale. The property in the goods does not pass to the purchaser until he

Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 82.
See Anderson v. Morice (1875), L. R. 10 C. P. 609, Ex. Ch.
Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co. (1886), 12 App. Cas. 128 P. C.
See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 83.

has done some act adopting the transaction or has signified his approval or acceptance to the seller. If the goods are returned or tendered back to the vendor within a reasonable time, the sale is annulled, and the latter cannot recover the price of them ; but, if the purchaser, having got possession of the goods, fails to exercise his option of returning them within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price of the goods may be recovered in an action for goods sold and delivered[1].

Sale or return

In order to determine whether the delivery of the goods is made "sale or return" or to an agent, the whole agreement must be looked to. The use of the words "sale or return" or "agent" is not conclusive. There may be only an agency to sell for the bailor[2]. On the other hand, a so-called "agency" may be really a transaction of sale or return[3]. Thus in *Weiner* v. *Harris*[4] the goods were received on the terms of the following memorandum, addressed to the bailor: "The goods mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to keep as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one-half the profit." Fisher, the author of the memorandum, pledged the goods with the defendant, a pawnbroker. *Held*, that the plaintiff could not recover the goods pledged, as the terms of the bailment, particularly the terms as to remuneration, and the provision that the goods were not to be kept as Fisher's own stock, showed that Fisher was an agent, and not a buyer; and, as he was a "mercantile agent" under the Factors Act, he could pass a good title to the defendant.

On the other hand, in the *Kronprinzessin Cecilie*[5], where goods were consigned to a company, who were appointed sole "selling agents" for the sellers. on the terms that the sellers received, not the sub-buyer's money less the agent's commission, but a sum calculated according to the average prices of all sales under a pool, which sum might be more or less than what their goods sold for, the sellers receiving on consignment a provisional price, after which they had nothing more to do with the goods, it was held by the Privy Council that the transaction was not an agency, but a sale to the "agents", and a resale by them to the sub-buyer.

In *re Ferrier*: *Exparte The Trustee* v. *Donald*[6], D delivered certain articles of furniture to F "on sale for cash or return within a week". The articles were seized in excution by a creditor of F within three days of delivery. D claimed and obtained delivery of the articles and on the adjudication of F as bankrupt the trustee in bankruptcy claimed the articles as property vested in him. It was held that the property in the goods did not pass to F in the circumstances of the case and the trustee was not entitled to them.

1. Moss v. Sweet, 16 Q. B. 493; 20 L. J. Q. B. 167; Wingfield, Ex parte, 10 Ch. D. 591, 593. See also Ray v. Barker, 4 Ex. D. 279; 48 L. J. Ex. 569.
2. Weiner v. Harris (1910) 1 K. B. 285 C. A.
3. Michelin Tyre Co. v. Macfarlane (1917) 55, Sc. L. R. 35 H. L.; Ex parte Bright (1879) 10 Ch. D. 566, C. A.; Re Nevill, Ex parte White (1871) 6 Ch. App. 397.
4. (1910) 1 K. B. 285 C. A.
5. (1917), 33 T. L. R. 292 (P. C.).
6. (1944) I. Ch. 295.

It is to be observed that in a case falling within this section, the person called a buyer is really only a bailee as he has not bought or agreed to buy but has merely an option to buy.[1] The position of the seller is that he has made an irrevocable offer to sell[2] and he cannot require return of the goods unless for example a course of dealing allows him to do so[3]. Whether a delivery is made under a contract for 'sale or return' etc. depends upon the effect of the transaction as a whole and the fact that it is called 'sale or return' is not conclusive as it may be an agency to sell for the bailor[4]. Again, the fact that the transaction is called an 'agency' does not show that it may not be really one of 'sale or return[5]'. Also, the fact that the agent is remunerated by the profit on a resale does not make him the buyer[6].

Acts adopting the transaction.

An 'act adopting the transaction' means an act indicating an election on the part of the bailee to become the buyer of the goods, or otherwise inconsistent with his being otherwise than the buyer thereof[7], as for example a sale or pledge of them, or any other unauthorised act in relation thereto which is inconsistent with a free power to return them according to the express or implied terms of the bailment[8]. It is to be noticed that to bring a case under this section, the circumstances must show that the buyer has an *option* to become the owner of the goods *on the statutory terms*, that is to say, in the events mentioned. If the contract specifies any other event as essential to the passing of the property, the covering words of section 19 (3) apply, and "a different intention appears." This fact is of particular importance if the goods get into the hands of a third person who claims them.

Where goods delivered "on sale or return" are pledged by the buyer, the pledging of the goods by him is "an act adopting the transaction" within the meaning of this section, so as to pass the property in the goods to him[9].

But in *Weiner* v. *Gill*[10], the plaintiff, a manufacturing jeweller, had delivered to Huhn some jewellery on the terms of the following memorandum · "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or discharged." Huhn delivered the jewellery to Longman on his representation that he had a customer, and Longman pledged it with the defendant, who received the articles in good faith. *Held*, that the plaintiff could recover, as the goods were not delivered to Huhn on statutory terms, but only on the terms that the property should pass if he paid cash or was charged with the goods, and he could therefore pass no title to the defendant.

1 Helby v. Mathews, (1895) A. C. 471.
2 Kirkham v. Attenborough (1897) I. Q. B. 201, C. A.
3 Halsbury, Vol. XXIX, 2nd Edn.
4 Weiner v. Harris, (1910) I. K. B. 285 C. A.
5 Re Nevill Exp. White, 6 Ch. App. 897 affirmed in Towle & Co. v. white 29 L. T. 78 H. L.
6 Ibid. See also author's "Law of Agency" pp. 21 to 28.
7 Weiner v. Gill; same v. Smith 1905 K. B. 172 (179).
8 Kirkham v. Attenborough, supra; per Jessal M.R. in Re Florence Exp. Wingfield 10 Ch. D. 591 (593) C.A.
9 Kirkham v. Attenborough (1897) 1 Q. B. 201, C. A.
10 (1906) 2 K. B. 574; 75 L. J. K. B. 916 (C.A.).

If goods are delivered on the terms that *the bailor* should have the option of treating the transaction a sale if the goods are not returned, the option is with him, and not with the buyer, and the case is not within this section. The property will then pass when the option is exercised[1]. Again, a *sale* subject to a right of the buyer to rescind it, if the goods are not approved, is equally outside this section[2].

In *Genn* v. *Winkel*[3] the plaintiff on January 4 delivered to the defendant a parcel of diamonds on sale or return, no time being mentioned for return. The same day the defendant delivered them to one Gutwirth on the same terms. Gutwirth, on January 6, delivered them to a fourth person, but there was no evidence to show on what terms The goods were lost in the possession of the fourth person. In an action for the price of the goods, *held* that the defendant had adopted the transaction and was liable.

Risk of loss and damage.

Where goods are sent to the customer on approval, until the transaction is adopted by the customer, the property remains in the seller Consequently, if the goods are lost in transit, the seller is the person entitled to sue the carrier[4]. Where goods sent on approval, or delivered on sale or return, are lost or damaged while in the bailee's possession, the bailment, unless it be otherwise agreed, is not converted into sale by reason of such loss or damage, if the bailee is not responsible for it. Thus in *Elphick* v. *Barnes*[5] the buyer of a horse on sale or return had eight days in which to return the horse, and it died within that time, but without his fault. It was held that the seller could not recover the price of the horse in an action for goods sold and delivered, the death of the horse not having deprived the buyer of his option.

It would seem that the buyer would be liable if his inability to return the goods was caused by the fraud of a third person to whom he had delivered them.[6] A delivery, however, of the goods to a third person for a special purpose consistent with the terms of the original bailment is not an act adopting the transaction, even although the bailee is thereby unable to return the goods; nor does the bailee in such circumstances retain them[7]. But a bailee may be responsible for the price by custom of trade[8], or by express agreement[9], where the goods are destroyed without his fault.

"Similar terms."

The phrase 'similar terms' means terms *ejusdem generis* with those in 'sale on approval' or 'sale or return'. So a delivery of goods is not made on terms similar to a delivery on approval or 'sale or teturn' unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods, and on terms subs-

Manders v. Williams (1849), 4 Ex. 399 ; 18 L. J. Ex. 437 ; 80 R. R. 588,

Head v. Tattersall (1871), L. R 7 Ex. 7 ; Cranston v, Mallow and Lien, (1912) Sess. Cas 112.

(1912), 107 L. T. 34 (C. A).

Swain v. Shepherd (1832) 1 Mood. & Rob. 728 ; 42 R. R. 782.

(1880) 5 C. P D 321.

6 Ray v. Barker (1879) 4 Ex. D. 279 ; 48 L. J. Ex. 569, C. A. ; See also Elphick v. Barnes and Genn v. Winkel, supra.

7 Weiner v. Gill, supra ; Ginn v. Winkel, supra.

8 Bevington v. Dale (1902) 7 Com. Cas. 112.

9 Bianchi v. Nash (1836) 1 M. & W. 545,

tantially the same as those already mentioned. For instance, a delivery of goods to a bailee on the terms that if they are not returned within a fixed or reasonable time, the bailor shall have the option of treating them as sold is not a delivery on similar terms as those of a delivery on approval or on sale or return, in as much as if the goods are not returned it rests with the bailor only to treat the transaction as sale or not and the property in the goods delivered does not pass to the bailee unless and until the bailor exercises the option[1]. Similarly, a delivery of goods to a bailee on the terms that the bailee shall have the option of becoming the owner of the goods on, for example, payment in cash[2], or his being charged for the goods in account[3], or the goods being invoiced to him[4] or on payment in full of instalments of rent for the hire of the goods[5] is not a delivery on the terms as required by this rule. Even a sale of goods on the terms that the buyer shall have the power of rejecting the goods, and revesting the property in them in the seller, if the goods are not approved, has been held to be not covered by the rule contained in this section.[6]

Instances of sales "on other similar terms," are sales on trial, or on approbation. When a person is entitled to make trial of goods, and the trial involves the consumption or destruction of that which is tried, it is a question of fact in each case whether the quantity consumed was more than necessary for trial. If so, the sale will have become absolute by reason of the approval implied from thus accepting a part of the goods[7].

There is no reason to assume that goods entrusted *jangad* are goods to be sold on approval, rather than goods to be shown for approval. By delivery of goods to a broker even on *jangad terms*, no property can pass to him under S 24 of the Act. Goods or jewellry may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purchase them. The goods in such cases are stated to be delivered for approval, i. e. *jangad*. S. 24 covers such a situation[8].

A refusal to agree to the price is a rejection, and the bailee's option of purchase is thereupon determined, and he becomes a bailee for custody only. He has then no option of becoming the owner, unless what amounts to a redelivery is made to him[9].

When goods are delivered on approval, or similar terms, the bailee may reject the goods for any reason if he *bona fide* does not

Manders v Williams, (1849) 4 Exch. 339.

Weiner v. Gill, (1905) 2 K B 172; approved in (1906) 2 K. B. 574. C A

Edwards v. Vaughan, (1910) 26 T. L. R. 545 C. A.

Truman v. Attenborough, (1910) 26 T. L. R 601.

Helby v. Mathews (1895) A. C. 471. Belsize Motor Supply Co. v. Cox (1914) I. K. B. 244. If the bailee binds himself to pay all the instalments of "rent" there is an agreement to buy and the case falls under this section.

Head v. Tattersall C. R. 7 East. 7; Neale v Ball, 2 East 117; Cranston v. Mallow and Lien (1912) S. C. 112.

Per Parke B in Elliott v. Thomas (1838) 3 M. & W. 170: 49 R. R. 558 See Lacy v. Moufiet (1860) 5 H. & N. 229; 120 R. R 555 Cf. Okell v. Smith (1815) 1 stark. 107; 18 R. R. 752. (1910) 26 T.L.R. 545, C. A.; Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 89.

Amritlal v. Bhagwandas, A. I. R. 1939 Bom. 435 cited in notes under S. 27 of the Act, post.

Bradley & Cohn Ltd. v. Ramsay & Co. (1911), 28 T. L. R. 13, 388 C. A.

approve of them, and is not compelled to base his rejection on defects in the goods themselves[1]. In this case there was a sale of a machine on approval, to be rejected within 21 days, the buyer to pay the carriage hire both ways. It was held that the buyer's right to reject was not confined to defects in the machine only and that he could reject on account of trouble with his workmen regarding its use.

It is to be noticed that like others contained in the foregoing sections of this Chapter the rule laid down in this section is also a *prima facie* rule being subject to the covering words of section 19, sub-section (3), namely 'unless a different intention appears'. Where goods are sent on trial or on approval, or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts fhe transaction but it is quite competent to the parties to agree that the property shall pass in the buyer on delivery, but, that if he does not approve the goods, the property shall then revert in the seller[2].

Reasonable time.

What is a reasonable time is a question of fact. Where the seller specifies the time within which the goods are to be returned if not approved or accepted, on the expiration of such time without any intimation from the bailee that he has not approved or accepted the goods, the property therein passes to the bailee and the sale is completed[3].

In sales "on trial", the mere failure to return the goods within the time specified for trial, makes the sale absolute[4], but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term and this right is not affected by his telling the seller in the interval that the price does not suit him, if he still retains possession of the thing[5].

Where no time is specified the law implies that the parties contemplate a reasonable time for the performance of the condition[6]. Time runs from the actual receipt of the goods by the buyer[7].

Effect of words "without giving notice of rejection".

It seems that under the Act the buyer may prevent the passing of the property by merely giving notice of rejection without sending the goods back. An actual return may of course be provided for by agreement[8].

Trade usage.

Sir Mackenzie Chalmers observes as follows[9] :—

1 Berry & Son v. Star Brush Co (1915), 31 T. L. R. 603 C. A.

2 See Head v. Tattersall, supra.

3 Ellis v. Mortimer (1805), 1 B. & P. (N. R.) 257 ; Elphick v. Barnes, supra : Blanckensee v. Blaiberg (1885) 2 T. L. R. 36, C. A. Marsh v. Hughes-Hallett (1900) 16 T. L. R. 376.

4 Humphries v. Carvalho (1812) 16 East, 45 ; 14 R. R. 280.

5 Ellis v. Mortimer (1805), 1 B. & P. N. R. 257. See also per cur in Elphick v. Barnes. supra.

6 Moss v. Sweet (1851) 16 Q. B. 493 ; 83 R. R. 560 ; Re Florence, Exparte Wingfield (1879) 10 Ch. D. 591, C. A. per Jessel M. R., at p. 593.

7 Jacobs v. Harbach (1886) 2 T. L. R. 419.

8 Benjamin on Sale, 7th Edn., p. 342 ; Ornstein v. Alexandra Furnishing Co. (1895), 12 T. L. R. 128.

9 Sale of Goods Act, 11th Edn., p. 47.

"In some trades the usage is that when goods are delivered on fourteen days' approval, the property does not pass to the buyer on the expiration of that time but the seller at any time after the fourteen days can call on the buyer, either to take or to return goods at once. When goods are sent on trial, or on approval or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts the transaction, but it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, but that if he does not approve the goods, the property shall then revert in the seller."

Reservation of right of disposal

*25. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract of appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Reservation of right of disposal—scope of the section.

It has already been stated that the rules for determining whether the property in goods has passed from seller to buyer, are general rules of *construction* for ascertaining the real intention of the parties, when they have failed to express it. Such rules cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However, definite and complete, therefore, may be the determination of election on the part of the seller, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership notwithstanding such appropriation[1].

***Analogous law.**
Section 19 of the English Sale of Goods Act, 1893, which is the same as section 25 of the Indian Act with the words "or custodier" after "bailee" in sub-section (1) omitted.

1. See Benjamin on Sale, 7th Edn., p. 382.

The present section deals with the case of a conditional sale and conditional appropriation. Sub-section (1) is of general application and is not confined to the cases of carriage by sea, while sub-sections (2) and (3) relate to carriage by sea. Sub-section (1) applies to contracts for the sale of specific goods, as well as to the subsequent appropriation of goods to a contract for the sale of unascertained goods, and to contracts which do not involve sea transit, as well as those which do. It would appear, therefore, that a seller who consigns goods by rail may, under this sub-section, effectively, reserve to himself the right of disposal of the goods by taking a railway receipt making the goods deliverable to his own order and retaining it ; and the opinion expressed to the contrary in *Deoraj* v. *Munshi Ram*[1] decided under the Indian Contract Act is no longer law.

The case upon which section 19 of the English Act is principally founded is *Mirabita* v. *The Imperial Ottoman Bank*[2]. The principles as to *jus disponendi* underlying the section have been elaborately discussed and laid down in *Ford Automobiles* v. *Delhi Motor Co*[3]. as follows :—

(1) In the case of such a contract (*i.e.*, a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading, a shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property.

(2) If, however, the vendor when shipping the articles which he intends to deliver under the contract, takes the bill of lading *to his own order*, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser.

(3) If the vendor deals with or claims to retain tte bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser.

(4) If the seller discounts a draft upon the buyer with a bank and anthorizes the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to transfer the

1 A. I. R. 1926 All. 679=48 All. 622=96 I. C. 130.
2 3 Ex. D. 164, at 172 ; 47 L. J. Ex. 418 (C. A.).
3 A. I. R. 1928 Bom. 125=24 Bom. L. R. 1140=70 I. C. 138 ; See also Balkishen v. Fazal Elahi A. I. R. 1927 Lah. 391=8 Lah. 178=102 I. C. 807 ; Gulab Rai v. Nirbhe Ram A. I. R. 1924 Lah. 299=4 Lah. 423=79 I. C. 194.

ownership when the draft is accepted, but intends also to remain the owner until this has been done.

The question of reserving the right of disposal is material only where parties living at a distance contract by correspondence. In such cases, the seller is anxious to protect himself against the default or insolvency of the buyer, and the buyer would naturally like not to part with his money before he is sure of the goods being delivered. What is then done is, that the seller ships the goods but takes the bill of lading in his own name or in the name of his agent at the buyer's place, and sends the bill to his agent with instructions to part with the bill of lading only on payment of the price[1]. Or he may draw a bill of exchange for the price on A, and send the bill to a banker, transferring to the banker the bill of lading. In both cases, there is no idea of passing the property in the goods to the buyer, though the goods have been ascertained and appropriated and in fact earmarked. Yet another course is to draw on the buyer a bill of exchange for the price and send it to the buyer himself with the bill of lading. This is to be found in sub-section (3) of the present section, but as observed by Jenkins C. J. in *Re Cargo ex S. S. Ruppenfels*[2] where the bill is drawn on the buyer himself, the question whether the *jus disponendi* is reserved is difficult to answer.

Where inspite of appropriation or delivery, the control of the goods remains with the seller there is a presumption that the seller has reserved the right of disposal. So, where goods are shipped and by the bill of lading they are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal[3].

In *Nippon Yusen Kaisha* v. *Ramjibhan Serogee*[4], where one clause of the contract of sale precluding the passing of property until payment of the price, was followed up by a clause providing for a lien of the seller as unpaid vendor on the mate's receipts or other documents and on the goods, the Judicial Committee held that reading the contract as a whole, the property in the goods passed when the goods were delivered to the ship owners.

Reservation of the right of disposal or *jus disponendi* may be effected by the terms of the contract or by subsequent conditional appropriation ; in the latter case it is a question of intention as to whether the appropriation was conditional. But the intention if any must be clearly expressed.[5] The seller may reserve the right of disposal in breach of the terms of the contract ; in such a case the property would not pass though the seller may be liable in damages for breach of contract[6]. Where there is a conditional appropriation or delivery with a reservation of right of disposal until certain conditions are fulfilled the property in the goods does not pass until such conditions are satisfied[7] and the fact that by reserving

1 (1917) A. C. 586.
2 (1914) 42 Cal. 334=30 I. C. 174 (cf) Walley v. Montgomery (1803) 102 E. R. 721 ; 7 R. R. 526 ; The Sarfareren (1915) 32 T. L. R. 108 ; Shepherd v. Harrison (1871) 5 H. L. 116.
3 Folk v. Fletcher, 18 C. B. N. S. 403.
4 A. I. R. 1938 P. C. 152=(1938) 2 Cal. 381=174 I. C. 564.
5 Juggernath v. Smith (1907) 34 Cal. 173, 180 ; Godts v. Rose (1855) 17 C. B. 229
6 See wait v. Baker (1848) 2 Exch. I,
7 Godts v. Rose, supra ; Cohen v. Foster, 61 L. J. Q. B. 643.

the right of disposal by the terms of the appropriation the seller is committing a breach of the original contract of sale which did not authorise any such reservation is, in relation to the passing of property, immaterial[1]. Where, however, the fulfilment of any such condition or the performance of any obligation arising therefrom by the buyer is not made a condition precedent to the passing of the property, the property in the goods appropriated or delivered passes to the buyer inspite of such condition or obligation, and it is not revested in the seller even if the buyer subsequently fails to fulfil such condition or to discharge such obligation, unless there is an agreement to that effect[2].

Illustrations.

Some illustrations of the reservation of the right of disposal in cases which would fall under sub-section (1) have already been given under section 23 and may be referred to. Some more are given below :—

Certain iron, part of a larger quantity, was delivered under contract which provided that certain bills outstanding against the plaintiff should be taken out of circulation by the defendant. The defendant failed to withdraw the bills. The plaintiff therefore stopped further deliveries and brought trover for the iron already delivered. It was held that, as the contract and delivery were conditional on the withdrawal of the bills, the property in the iron had not passed to the defendant, and consequently the action lay[3].

(2) In *Loeschman* v. *Williams*[4] a manufacturer of pianos brought trover for a piano which he had sold to a third person, to be delivered at the house of the defendant, a packer, and to be paid for in ready money. The plaintiff's servant had delivered the piano at the defendant's premises and had asked for payment, but the defendant was stated to be away from home, and the piano was left on the understanding that it was to be paid for before it was delivered to the buyer. The defendant afterwards shipped it to the buyer without payment. *Held*, that the delivery was conditional, and the action would lie.

(3) In *Barrow* v. *Coles*[5] that was a sale of 100 bags of coffee. The sellers drew a bill of exchange upon the buyer, payable to their order, and endorsed it to the plaintiff, and annexed to it the bill of lading with an endorsement upon it making the coffee deliverable to the buyer if he accepted the bill of exchange and paid it, and if not, to the holder of the latter. The buyer accepted the bill of exchange and detached it from the bill of lading, which he endorsed for value to the defendant, but did not pay the bill of exchange. The property did not pass to the buyer, and the endorsee of the bill of exchange successfully maintained trover for the coffee against the endorsee of the bill of lading, to whom the coffee had been delivered.

(4) There was a sale of a cargo of umber shipped py the seller on board a ship chartered by the buyer. The sellers took bills of

1 Wait v. Baker, supra ;
2 Key v. Cotesworth, 7 Exch. 595 Newington v. Levy, L. R. 6 C. P. 180, Exch.
3 Bishop v. Shillito (1819) 2 B. & Ald. 329 (n), 20 R. R. 457 (n).
4 4 Camp. 181 ; 16 R. R. 772.
5 (1811) 3 Camp. 92, 13 R. R. 763.

lading making the cargo deliverable to order or assigns, and drew a bill of exchange on the buyer for the price which they discounted with their bankers, handing over to them the bills of lading to be given up to the buyer upon his accepting and paying the bill of exchange. The buyer at first declined to meet the bill, but subsequently tendered the amount for which it was drawn and demanded the bills of lading. The bank refused to accept the tender and sold the cargo. *Held*, that the property passed to the buyer on tender of the amount of the bill, and that he could maintain trover against the bank for the wrongful sale of the cargo.[1]

(5) A consigns goods to B by ship, and draws on him for the price. He discounts the bill with a bank, endorses the bill of lading in blank, and authorises the bank to hand the bill of lading to B when he accepts the bill of exchange. Apart from any special terms in the contract, the property in the goods is transferred to B as soon as he accepts the bill of exchange[2].

(6) In *the Miramichi*[3] some American shippers sold a quantity of wheat *c. i. f.* to German buyers, payment to be made by cheque against documents. The sellers drew a bill for the price which they discounted with their bankers and handed to them the bill of lading generally endorsed and the certificate of insurance, to be delivered to the buyers on their payment through a Berlin bank of the bill of exchange. Before the documents were tendered to the buyers, and before payment of the bill of exchange, the ship was seized as enemy property. *Held*, that the wheat remained the property of the American sellers.

(7) In *Brandt* v. *Bowlby*[4] it was held that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the bargain he was to accept bills for the price as a condition concurrent with the delivery, and had refused to perform this condition.

(8) In *Shepherd* v. *Harrison*[5] there was a sale of a quantity of cotton. The invoice was made out as shipped on account of and at the risk of the buyer, but the bill of lading was taken deliverable to the order of the seller. The bill of lading, endorsed in blank, with a bill of exchange attached, was sent to the buyer by the seller's agent, who requested the buyer's protection to the draft. The buyer retained the bill of lading but returned the bill of exchange unaccepted on the ground that the buyer's orders had not been complied with. *Held*, that the property in the cotton had not passed to the buyer.

A provision in a contract of sale for postponment of delivery until payment of the entire price will not *per se* stay the passing of the property in the goods sold. The fact that the seller is also given

1 Mirabita v. The Imperial Ottaman Bank (1878) 3 Ex. Div 164, C. A. Compare The Prinz Adalbert (1917) A. C. 586, P. C.

2 The Prinz Adalbert, (1917) A. C. 586 P. C.; cf. The Derfiinger No. 2 (1918), 87 L. J. P. C. 195, where the bill was not accepted till after the goods had been seized as prize, and the property was held not to have been transferred.

3 (1915) P. 71.

4 2 B. & Ad. 932; 1 L. J. (N. S.) K. B. 14; 36 R. R. 796.

5 (1869), L. R. 4 Q B 196; 38 L J. Q. B. 105, 177. Compare Cahn v. Pockett's Bristol Channel Steam Pocket Co, (1899) 1 Q. B 643, C. A.

a right to resell after notice on default of payment, does not reserve to the seller the right to sell to goods pending the fulfilment of a condition precedent.[1]

Bills of lading—sub-section (2)—seller taking the bill of lading to his own order.

A bill of lading is included in the definition of "document of title to goods[2]." It is a symbol of the goods it represents[3], or, to use the language of section 2 (4) of the Act, a document used in the ordinary course of business as proof of the possession, or control of goods, or authorising or purporting to authorise its possessor either by endorsement or by delivery to transfer or receive goods thereby represented. A bill of lading is not necessarily a symbol of the right of property; whether it represents such a right depends on the contract. Thus, for example, a bill of lading issued by the master of a ship without the seller's contract will not pass the property.[4] Where endorsed in blank, the bill is transferable by delivery[5]. If the seller sends an unendorsed bill of lading he in effect sends none.[6] The transfer of a bill of lading may be made with the intention of passing the property in the goods unconditionally[7], or it may be made with the intention of passing the property conditionally, or for a specific purpose only, and not for the purpose of passing the property in the goods[8]. Bills of lading are generally drawn in sets of three, and the property passes to the *bona fide* transferee who is first in point of time[9]. Sometimes, the following words are added in the bill: "One of these bills of lading being accomplished, the others shall stand void."

Recently it has been held in *Ugar Chand* v. *Motiram*[10] that where the seller sends the goods to the buyer by rail, but takes the railway receipt in his own name, and despatches it to his banker with instructions to deliver it to the buyer only on receiving payment, the circumstances bring this case within this section and the mere facts of the buyer accepting a bill drawn on the seller has not the effect of passing the property in the goods.

Seller taking the bill of lading to his own order

The difference in the legal effect of delivering goods to a carrier on the on hand, and one board ship to be carried under a bill of lading on the other, on which sub-section (2) is based, has thus been pointed out by Mr. Benjamin:[11]

1 Shankar Lal—Kundan Lal v Jamna Das—Piyare Lal, 39 P. L. R. 778.
2 See section 2 (4) ante.
3 Per Bowen L. J. in Burdick v Sewell (1884) 13 Q. B. D. 159, C. A., at p. 171; see also Sanders v. Maclean (1883); (2883) 11 Q. B. D. 327, C. A., at p. 341.
4 Craven v. Ryder, (1816) 128 E. R. 1103 : I6 R. R. 644.
5 See section 11 of the English Factors Act, 1889; see also the Bills of Lading Act, 1856 Appendix.
6 Shepherd v. Harrison (1869) L. R. 4 Q. B. 106, at p. 204.
7 Sewell v. Burdick (1884) 10 App. Cas. 74.
8 Sub-sections (2) and (3) above; Bristol Bank v. Midland Rail Co. (1891) 2 Q. B. 658, C. A.; Hibbert v. Carter (1787) 1 Term. Rep. 745; 1 R. R. 388; Patten v. Thompson (1816) 5 M. & S. 350; 17 R. R. 350; Bruce v. Wait (1837) 3 M. & W. 15.
9 Barber v. Meyerstein (1870) 4 H. L. 317.
10 A. I. R. 1938 Sind 18.
11 Benjamin on Sale, 7th Edn. p. 410, adopted by Lord Chelmsford in Shephered v. Harrison, supra. It may be profitable to consult the whole series of rules propounded in the continuation of the passage.

"Where goods are delivered by the seller in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it and the delivery to him being equivalent to a delivery to the buyer.

"Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried."

The seller, therefore, may take the bill of lading to his own order. In that case, the seller keeps to himself the right of dealing with property shipped and also the right of demanding possession from the captain, and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer[1].

It may be that the seller commits a breach of contract by thus reserving the right of disposal, but this will not cause the property to pass: for the failure on the seller's part to satisfy the conditions required for ascertaining and appropriating the goods contracted for cannot be remedied in the buyer's favour by construction of law on the ground that the seller ought to have what he did not. Where a seller in effect refuses to appropriate a particular cargo to the contract by taking bills of lading to the order of a real or fictitious nominee of his own his conduct may be a breach of contract in the circumstances, but property in that cargo will none the more be transferred for that reason[2]. An unsuccessful attempt by a seller to appropriate a cargo to the contract will not prevent him from appropriating another cargo, and insisting upon the buyer accepting it, if he can do so in accordance with the terms of the contract as to time and otherwise[3]. In this case, the plaintiffs, the sellers, tendered a cargo of maize which was rejected by the defendants as not being in accordance with the contract and afterwards, and within the contract time, the plaintiffs tendered a cago which was in accordance with the contract, and the second tender was held to be good.

Shipment without reservation of right of disposal—presumption of intention to reserve right of disposal when rebutted.

If the seller takes out bills of lading which make the goods deliverable to the buyer's order, the normal presumption would be that delivery to a carrier, and especially a shipmaster, passes the property. It was observed in *Ex-parte Banner*[4]:

"We conceive it is perfectly settled that if a consignor in such a case wishes to prevent tthe property in the goods and the right to deal with the goods whilst at sea from passing to the consignee, he must, by the bill

1 Shepherd v. Harrison, supra, per Lord Westbury, at p. 128.

2 Gabarron v. Kreeft (1875) L. R. 10 Ex. 274.

3 Borroman v. Free (1878) 4 Q. B. D. 500.

4 (1876) 2 Ch. Div. 278, 288, 289.

of lading make the goods deliverable to his own order and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods *in transitu*,[1] but subject to that right the property in the goods and the right to the possession of the goods is in the consignee."

In this case *Christiansen & Co.*, who carried on business at Para, acted as commission agents in the purchase and consignment of goods for Tappenbeck & Co. at Liverpool. By the course of dealing, Christiansen & Co. drew bills of exchange on Tappenbeck & Co. which they discounted at Para, They then purchased goods with the proceeds and shipped them for Liverpool, and sent the bills of lading making the goods *deliverable to Tappenbeck & Co.*, and the invoices by post direct to that firm, advising them of the bills drawn upon them. Both firms stopped payment. At time of Tappenbeck & Co.'s failure goods were in transit to Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills were accepted, and others refused acceptance by Tappenback & Co., but none of them were paid at maturity. *Held*, that on the shipment of the goods and the posting of the bill of lading, the property in the goods had passed unconditionally to Tappenbeck & Co., and that therefore the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. *Shepherd* v. *Harrison* was distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the endorsed bill of lading, together with the bill of exchange, *to an agent* of his own.

The presumption that the seller intended to reserve the right of disposal may be rebutted by facts to the contrary. In *Ogle* v. *Atkinson*[2] the plaintiff ordered goods from Smidt & Co. at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of the plaintiff and as being the plaintiff's own goods. according to the statement of Smidt & Co. themselves. They afterwards, by fraudulently misrepresenting that the form of the bills was immaterial, as the goods were to be delivered to the owner, obtained from the captain bills of lading in blank, and sent them to their agent with orders to transfer them to a third person unless the plaintiff would accept certain bills of exchange, which Smidt & Co. drew in favour of that third person. At the same time they enclosed a letter to the plaintiff advising him of the shipment, and containing invoices stating that the goods were shipped for account and risk of the plaintiff, but making no mention of any bills of exchange to be accepted. *Held*, that the shipment being unconditional. the property had passed by the delivery to the plaintiff's agent, the captain, and was not divested nor affected by the subsequent acts of Smidt & Co. The form of the bills of lading was either immaterial, as stated by Smidt & Co.; or if it was material, there was a fraud on the plaintiff[3].

1 As to this see sections 50-52 below.
2 5 Taunt 759; 1 Marsh. 323; 15 R.R. 647.
3 See also Walley v. Montgomery, 3 East 585; 7 R. R. 526.

The transfer of a bill of lading to the buyer on the terms that he shall *after* receipt thereof send a draft or pay for the goods, *prima facie* does not amount to the reservation of the right of disposal.[1]

In *Cowasjee* v. *Thompson*[2] goods were sold to be paid for by a bill drawn by the sellers or cash, at the option of the buyers. The buyers elected to pay bill which was duly drawn and accepted. The goods were shipped on the buyer's vessel, the sellers taking the mate's receipts which they retained in their possession. The master, some days after the shipment and without requiring the delivery of the receipts, signed bills of lading describing the good as shipped by the buyers. *Held*, that the property in and possession of the goods had passed to the buyers notwithstanding the retention of the receipts, as it was the duty of the sellers when the goods were delivered and paid for to surrender the receipts.

In *Van Casteel* v. *Booker*[3] the goods had been placed by the seller on board of a vessel sent for them by the buyers and a bill of lading taken for them deliverable "to order or assigns," and showing that they "were freight free", and the bill of lading was endorsed in blank by the seller and sent to the buyers with an invoics stating the goods to have been shipped "on account and risk" of the buyers. *Held*,

First, that the decisions in *Ellershaw* v. *Magniae*[4] and *Wait* v. *Baker*[5] had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show that *no property* passed to the consignee, it being clearly indended by the consignor to preserve his title to the goods *till he did a further act*.

Secondly, that notwithstanding the form of the bill of lading, the contract may be really made by the consignor as agent of the buyer, and it was a question for the jury what under all the circumstances—such as the form of the bill of lading on the one hand, and on the other, the words " freight free" the language of the invoice and the immediate transfer of the bill of lading-was the real intention of the consigners or sellers. In this case it was found by the jury that the goods were put on board for, and on account of, and at the risk of, the buyers and the court refused to set aside a general verdict for the defendants.

Seller retaining lien only.

In an intermediate case, in which the seller intends so to appropriate the goods on shipment as to pass the property and yet deals with the bill of lading in such a way as to prevent the buyer obtaining possession of the goods without paying, or accepting a bill of exchange in payment of the price, the property will pass, subject to the seller's lien for the price. Thus, in *Brown* v. *Hare*[6]

1 See Wilmshurst v. Bowker, 2 M. & G. 792 ; 10 L. J. C. P. 171 ; 66 R. R. 808.
2 5 Moo. P. C. 165 ; 70 R. R. 27.
3 2 Ex. 691 ; 18 L. J. Ex. 9 ; 76 R. R. 729.
4 (1843), 6 Ex. 570 : 86 R. R. 398 n.
5 (1848), 2 Ex. 10 ; 17 L. J. Ex. 307 ; 76 R. R. 469.
6 (1858) 27 L. J. Ex. 372, 117 R. R. 811, affirmed 4 H. & N. 822, 118 R. R. 786 ; See also Jenkyns v. Brown (1849) 14 Q. B. 496, 80 R. R. 287.

a seller shipped goods under a f. o. b. contract, by the terms of which the buyer was, on delivery of the bill of lading to accept a bill of exchange for the price payable three months after date, the date being the date of the shipment of the goods, and on shipment took the bill of lading to shipper's order and specially endorsed it to the buyer, and sent it, together with the invoice and bill of exchange duly drawn on the buyer to the seller's broker, through whom the sale had been effected and the latter left the documents with the buyer. It was held that the property in the goods passed on shipment, and the buyer was liable for the price, although the goods had been lost on the voyage and before the buyer rceived the documents, and he refused to accept the bill of exchange on that ground.

Sub-section (3)—delivery in exchange for payment or security.

Where the seller draws a bill of exchange on the buyer for the price and sends it to the buyer along with the bill of lading on the understanding that the buyer must honour the bill by acceptance or payment, the buyer has no right to retain the bill of lading if he dishonours the bill of exchange, and, if he nevertheless retains the bill of lading wrongfully, no property passes to him[1]. The buyer who thus wrongfully takes possession of, and deals with, the goods is liable to the seller in conversion and the seller may recover their value, subject to a deduction of expenses incurred, such as for freight and landing charges[2]. Where, however, a bill of lading is sent to the buyer with advice only of the bill of exchange, the acceptance of the bill of exchange is not a condition precedent to the passing of the property[3].

Where the delivery of the goods, or of a document of title to goods, is made in exchange for payment of or as security for, the price of the goods, the seller is presumed to reserve the right of disposal and the property in the goods does not pass until the payment is made or security given[4].

Summary of the provisions of section 25 and cases decided thereunder.

Generally delivery to a carrier or bailee who receives the goods for transmisson to the buyer appropriates those goods to the contract; but the seller may exclude the operation of this rule by reserving the power of disposal. In particular the appropriation may be and constantly is made conditional on payment or tender of the price[5], or acceptance of a bill of exchange; this last is quite a common practice. In such cases the property passes only when the condition is satisfied.

1 Cahn v. Pockett's Bristol Co. (1899) 1 Q. B. 643, C. A.; Rew v. Payne (1885) 53 L. T. 93; Mirabita v. Imperial Ottoman Bank (1878) 3 Ex. D. 164 C. A.

2 Peruvian Guano Co. v. Dreyfus (1892) A. C. 166, 170, 174, 186.

3 Key v. Cotenworth (1852) 7 Exch. 595, 607; 86 R. R. 750, 759, 760. Ro Tappenbeck, Ex-parte Banner (1876) 2 Ch. D. 278, 288, C. A.; Konig v. Brandt (1901) 84 L. T. 748, C. A.

4 Barrow v. Coles (1811) 3 Camp. 92; 13 R. R. 763; Ryan v. Ridley (1902) 8 Com. Cas. 105. The Charlotte (1908) p. 206, C. A. The Prinz Adelbert (1917) A. C. 586, P. C. The Orteric (1920) A. C. 724, 733, P. C.; Eastwood v. Studer (1926) 31 Com. Cas. 251.

5 See Godts v. Rose (1855) 17 C. B. 229, 104 R. R. 668.

A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent authorised to sign it and stating the terms on which the goods were delivered to and received by the ship. When signed by the carrier or his agent, who is often the master of the ship, the bill of lading is handed to the shipper. If the shipper intends the porperty in the goods to pass to a purchaser as soon as, or before, they are put on board, the bill of lading will naturally state that the goods are deliverable to the purchaser or his assigns. If he does not intend this, the bill of lading will state that the goods are to be delivered to the shipper or his assigns. A vendor may annex terms to a bill of lading preserving his control over the cargo and the *jus disponendi* of the goods on arrival at their destination[1] although they may be shipped on board the purchaser's ship, and may be in the hands of the purchaser's ship-master[2]. Where a bill of lading states that goods are consigned to a merchant abroad, and that the goods are shipped by order and on account of the consignee, this is strong evidence that the property was intended to vest in the consignee from the time they are put on board[3]. But, if goods are delivered to a ship-master, to be carried under a bill of lading, whereby the latter undertakes to carry them for and on account of the vendor, and deliver them to the vendor at the port of destination, or to the assignee of the bill of lading, this is evidence of an intention not to transfer the property until the bill of lading has been endorsed to the purchaser[4]. The fact of the seller taking a bill of lading to his own order is strong evidence that the appropriation is conditional, whether he keeps it himself or sends it endorsed in blank to his agent, with instructions to the agent not to part with it until the goods are paid for or the bill accepted[5]. Where a shipper keeps in his own or his agent's hands a bill of lading making the goods deliverable to his order until certain conditions have been fulfilled by the consignee, the property in the goods will not pass until such conditions are fulfilled by the consignee, or at least until he offers to fulfil the conditions, and demands the bill of lading. The vendor retains not only a lien but a power to dispose of the goods so long as the vendee continues in default[6]. But if the bill of lading is only dealt with to secure the contract price, then, on payment or tender, the goods vest in the purchaser[7]. The incidence of the risk as between buyer and seller is a very strong indication as to which of them owns the property[8].

1 Van Casteel v. Booker, 2 Exch. 691 ; 18 L. L. J. Ex. 9 ; Jenkyns v. Brown, 14 Q. B. 496 ; 19 L. J. Q. B. 286 ; Gabarron v. Kreeft, L. R. 10 Ex. 274 ; 44 L. J. Ex 238.

2 Turner v. Liverpool Dock Trustees, 6 Exch. 543 ; 20 L. J. Ex. 393 ; Rosevear China Clay Co., Ex parte, 11 Ch. D. 560 ; 48 L. J. Bankr. 130.

3 Brown v. Hodgson, 2 Campb. 36.

4 Wait v. Baker, 17 L. J. Ex. 307 ; Jenkyns v. Brown supra ; Joyce v. Swann, 17 C. B. N. S. 84 ; Mirabita v. Imperial Ottoman Bank, 3 Ex. D. at p. 172 ; 47 L. J. Ex. 418.

5 See Bank of Morvi, Ltd. v. Baerlein Bros. A. I. R. 1924 Bom. 325=48 Bom. 374=79 I. C. 1012 ; Re Cargo ex S S. Rappenfels (1915) 42 Cal. 334=3 I. C. 174 ; Mehta & Co. v. Joseph Heureux A. I. R. 1924 Bom. 422=48 Bom. 531 =80 I. C. 766 ; Bal Kishon-Basheshar Nath v. S. M. Fazal Elahi A. I. R. 1927 Lah. 391=8 Lah. 173=102 I. C. 807.

6 Ogg v. Shutor 1 C. P. D. 47 ; 45 L. J. C. P. 47.

7 Mirabita v. Imperial Ottoman Bank, 3 Ex. D. 164 ; 47 L. J. Ex. 418.

8 The Parchin (1918) A. C. 157 , see also The Kronprinsessan Margareta (1921) 1 A. C. 486.

In *Re Cargo Ex. Ss Rappenfels*[1] goods were shipped by British subjects under a c. i. f. contract on a German steamer which was captured after the declaration of war. The bills of lading were made out to the order of the sellers and were endorsed in blank and made over to a bank with the bills of exchange, some of which were discounted with the bank. Some of the buyers were British subjects and others were alien enemies The bills of Exchange were not accepted by the buyers. It was held that property in the goods did not pass to the buyers and so the goods could not be condemned (as enemy goods) as the sellers retained the right of disposal over them. In *Bank of Morvi* v. *Bacrlein Bros*[2]. bills of lading drawn to the order of the seller were endorsed in blank and made over to a bank with instructions not to deliver the same to the purchaser until paid for. The buyer having refused to pay, the property did not pass. In *Mehta & Co.* v. *Joseph*[3] a bill of lading was to be delivered on acceptance of the draft. The property did not pass as the draft was not accepted. Similarly in *Bal Kishen* v. *Fazal Elahi*[4], bill of lading was sent to seller's agent to be delivered against payment. It was held that the property did not pass on acceptance of draft until the payment of the draft. (Where documents are to be delivered to the buyer on acceptance of the draft it is called D/A terms; and where they are to be delivered on payment of the draft it is called D/P term. In the former case property passes on acceptance of the draft; in the latter on payment of the draft).

In case of difference, the terms of the bill of lading prevail over those of an invoice, and. it seems. over any inference from ambiguous terms in any other documents evidencing the contract[5]. "It is perfectly well settled, that......the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading[6]."

The following observations of Lord Justice Cotton in *Mirabita* v. *Imperial Ottoman Bank*[7] would pay perusal :

"Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself the power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of pro-

1 (1914) 42 Cal. 334.
2 (1924) 48 Bom. 374.
3 (1924) 48 Bom. 581,
4 (1927) 8 Lah. 173; See also Ford Automobiles Ltd. v. Delhi Motor Co. (1922) 24 Bom. L. R. 1140, 1148 cited at p, 268.
5 See Ogg v. Shuter supra.
6 Lord Cairns in Shepherd v, Harrison (1871) L. R. 5 H. L. at p. 181.
7 supra, pp. 172, 173.

perty, therein, and accordingly in *Wait* v. *Baker*[1], *Ellershaw* v. *Magniec*[2] and *Gabarron* v. *Kreeft*[3] (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks*[4], *Shepherd* v. *Harrison*[5] *Ogg* v. *Shuter*[6]. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser."

In this case, accordingly, where the bills of lading had been handed to the bankers who discounted the bill of exchange drawn against the cargo, and this was done only to secure payment of the bill of exchange at maturity, it was held that the buyer was entitled to the goods on offering to pay the bill of exchange, and that his tender constituted a final appropriation vesting the property in him.

In *The Parchim*[7] Lord Parker observed :

"The English cases, however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract : *Wait* v. *Baker*[8] ; *Gabarron* v. *Kreeft*[9]. This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract : *Mirabita* v. *Imperial Ottoman Bank*[10] ; *Van Castele* v. *Broker*[11]; *Browne* v. *Hare*[12]; *Joyce* v. *Swann*[13]. The *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.

"Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods to the person indicated by the will of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship (even if it belongs to the buyer or is chartered by him) his warehouse so far as these

1 (1848) 2 Ex. 1, 76 R. R. 469.
2 (1843) 6 Ex. 570 n., 86 R. R. 398 n.
3 (1875) L. R. 10 Ex. 274.
4 (1851) 6 Ex. 543, 86 R. R. 377, Ex. Ch.
5 (1869-1871) L. R. 4 Q. B, 196, 5 H. L. 116.
6 (1875) 1 C. P. Div. 47.
7 (1918) A. C. 157, pp. 170-171.
8 (1848) 2 Ex. 1, 76 R. R. 469.
9 (1875) L. R. 10 Ex. 274.
10 (1878) 3 Ex. Div. 164.
11 (1848) 2 Ex. 691.
12 supra : p. 329.
13 (1864) 17 C. B. N. S. 84.

goods are concerned, and the case as pointed out by Pollock, C. B. in *Browne* v. *Hare* is to be governed by the same rules as that of a person contracting to buy goods in a warehouse of the seller where they are to remain until paid for, so that the seller retains a lien They may or may not become the buyer's property before he pays for them, according to the terms of the contract."

The following passage from Mr. Benjamin's treatise[1] indicates at what stage property in goods shipped from one country to another may pass to the firm ordering the goods:

"If A in New York orders goods from B in Liverpool without sending the money for them, B may execute the order in one of two modes, without assuming risk. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent with instructions, not to transfer it to A except on payment for the goods. Or B may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing business it is impossible to infer that B had the least idea of passing the property to A. at the time of appropriating the goods to the contract. So that, although he may write to A, and specify the packages and marks identifying the goods, and although he may accompany this with an invoice, stating that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B till the bill of lading has been endorsed and delivered up to A. And a third course now, under the Act, is available to the seller. He may draw upon the buyer a bill of exchange for the price, and may send it, together with the bill of lading *direct* to him. In such a case, however, he trusts the buyer In this class of cases it is often a matter of great nicety to determine whether or not the seller's intention was really to reserve a right of disposal"

See appendix for "c. i f." contracts.

Where the performance of some obligation is imposed upon the buyer, but is not made a condition of the transfer of the property, the property once passed, is not revested in the seller by the buyer's subsequent default.[2]

Risk *prima facie* passes with property

26. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

1 Benjamin on Sale, 7th Edn., p. 383; cited with approval in Re Cargo ex S. S. Rappenfels (1915) 42 Cal. 334, 342-3=30 I. C. 174.

2 Key v. Cotesworth (1852), 7 Exch. 595; Re Tappenbeck, Ex-parte Banner (1876), 2 Ch. D. 278, C. A.; Newington v. Levy (1870), L.R. 6 C.P. 180, Ex. Ch.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Analogous law.

This section corresponds to section 20 of the English Sale of Goods Act, 1893. The principle involved in it was enacted in section 86 of the Indian Contract Act, 1872—See Appendices A and B.

Risk *prima facie* passes with property.

Old section 86 of the Indian Contract Act laid down an inflexible rule that when goods become the property of the buyer he *must* bear any loss arising from their destruction or injury[1]. It was, therefore, not competent for the parties to agree that, in spite of the property passing to the buyer, the goods should remain at the seller's risk. Under the present section the parties may provide by their agreement that the risk shall pass at some time or on some condition not necessarily simultaneous with the passing of the property[2]. "As a general rule," says Blackburn J in *Martineau* v. *Kitching*[3], "*res perit domino*, the old civil law maxim, is the maxim of our law; and when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is. If, on the other hand, you go beyond that, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable It may very well be that the property shall be in the one and the risk in the other." By the Civil Law it was always considered that if there was any weighing or anything of the sort which prevented ehe contract from being *perfecto emptio*, whenever loss was occasioned by one of the parties being in *mora*, and it was his default he shall bear the risk joint as if there was *emptio perfecto*."

In *Sweeting* v. *Turner*[4] goods in a house held on lease were sold by auction under conditions expressly providing that all lots should be taken to be delivered at the fall of the hammer, after which time they should remain at the exclusive risk of the purchaser The rent of the house was in arrear, and after the sale the landlord threatened to distrain on these goods, and to prevent distress the auctioneer paid the rent and paid over the net proceeds of the sale only to the original owner of the goods, who was also the tenant of the house. If was held that the auctioneer had no right to make this deduction as the property in the goods had passed to the respective buyers and the seller, therefore, had no further interest in them, and the auctioneer had no implied authority from him to pay the rent in order to save the goods from distress. 'It is thoroughly established that by the English law, where a bargain and sale is completed with respect to goods, and everything to be

Shoshi Mohun v. Nobo Kristo (1879) 4 Cal. 801.

Martineau v. Kitching (1872) L. R. 7 Q. B. 436, at pp. 454, 456, per Blackburn J. (transfer of risk after two months), approved in The Parchin (1918) A. C. 157, at p 168 P. C.; Castle v. Playford (1872) L. R. 7 Exch. 98, Ex. Ch.; Sterns v. Vickers (1923) 1 K. B. 78, C. A.

Supra.

(1871) L. R. 7 Q. B. 310.

done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser although the vendor still retains his lien, the price of the goods not having been paid[1]; and any accident happening to the things subsequently, unless it is caused by the fault of the vendor, .. . must be borne by the purchaser, and, by parity of reasoning, any benefit, and not that of the vendor[2]."

Where the defendant purchased 975 bales of rice, being the whole contents of a gola, paid earnest money, and took part delivery of the rice and the rest was destroyed by fire, it was held that the property in the whole had passed to him and he was liable to pay the balance of the price[3].

"Unless otherwise agreed"—risk by agreement.

The general rule being that the risk attaches to the ownership of the goods, and passes with the property the parties may by agreement evince a different intention. And this may be inferred from their course of dealing, or by usage binding on both.[4] Thus ownership may in particular cases be separated from the risk, but that this may be so, it is necessary that there should be some appropriation of the property to the contract[5]. In this case the plaintiff agreed to purchase and the defendant to sell ten bales of cloth, of which nine bales were delivered and paid for at Amritsar. and on the 15th November 1920 the Berar Manufacturing Company at Badnera consigned one bale from that place to Amritsar and the railway receipt, which was in favour of the consignors, was endorsed by them to the Chartered Bank of India at Amritsar who were to deliver the receipt to the purchaser on payment of the price by him. It appeared that the bale arrived at Amritsar on 7th January 1921 and was stolen from the goods shed at Amritsar on 10th January, and on 13th January the plaintiff paid the money to the bank and obtained the railway receipt. but when he went to the railway station he found that the bale had been stolen. It was then contended that by a special agreement the buyer became responsible for the risk as soon as the goods left the premises of the mills at Badnera. *Held*, that on 10th January 1921, when the goods were lost, they had not become the property of the buyer and he could not, therefore, bear the loss.

In *Anderson* v *Morice*[6], a case of an insurance of an undivided quantity of goods, Lord Hatherley observed :

1 See sections 46-48 post

2 Per Blackburn J. p 313; cf Black v Homersham (1878) 4 Ex. Div. 24 (dividend on shares).

3 Shoshi Mohun Pal v. Nobo Krishto Poddar (1878) 4 Cal. 801.

4 See Martineau v. Kitching (1872), L. R. 7 Q B. 486; goods were to be weighed on being taken away by the buyer and they were to be at seller's risk for two months. The goods were destroyed after the lapse of two months but before being weighed. Held, the risk fell on the buyer and he was liable for the price. Castle v. Playford (1872), L. R. 7 Ex 98, at p 100, Ex. Ch. where the purchaser took upon himself all risks and dangers of the sea. Anderson v. Morice (1875), L. R 10 C. P 609, at p. 616; Inglis v. Stock (1884), 10 App. Cas. 263 (f. o b contract).

5 N. S. Billimoria v. Gauri Mal Narain Das, A. I. R. 1928 Lah. 481=112 I. C. 457, a case under section 80, Indian Contract Act.

6 (1875) L. R. 10 C. P. 609, 1 App. Cas. 713.

"It is perfectly conceivable, indeed in many cases it has been so as a matter of fact, that a person selling some goods at a distant place to a person living in this country, may say, I am perfectly willing to sell you these goods; I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage, and although you will not be expected to pay for the goods and acquire the property until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit, and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain."

Provision for insurance

The fact that one party or the other is to insure the goods is material to the determination of the question on whom the risk is to fall. A provision that either party shall insure the goods contracted for is strong evidence that the risk of loss was intended to be assumed by him[1], but it is not conclusive[2]. When the goods contracted for are a quantity, it is a question depending upon the terms of the contract and the circumstances of the case whether the insurance covers, and the risk accordingly attaches to the quantity of goods when completed only, or else to each separate instalment when delivered[3].

Risk separable from property

Where the price of goods to be shipped includes freight and insurance premium, as in a c i. f. contract (see Appendix), the risk *prima facie* attaches to the buyer on the goods being shipped[4] in terms of the contract provided the necessary documents are tendered in due time. The seller takes the risk if the price is payable only on the goods arriving at their destination[5]. By the custom of a particular trade goods ordered on approval may be at the risk of the person ordering them from the moment they are delivered[6]. Where, a motor car is garaged for sale at customer's risk, the garage-keeper is not liable for damage caused by the negligence of his servants.[7] Even unascertained goods may be at the buyer's risk by agreement.[8] Where goods are to be shipped by the seller "f. o. b." the risk, as a rule, attaches to the buyer on the shipment being made[9], whether the goods are at that time specific or unascertained.

In *Kanshi Ram* v. *Mulchand*[10], a case under section 86, Indian Contract Act, where a consignment of lime was sold and the price paid in part, the balance to be paid after the lime was weighed, and the goods were delivered in a damaged state, it was held that the property had passed and so the risk was with the buyer. In

1 See Fragano v. Long, 4 B. & C. 219; 3 L J. (O. S.) K. B. 117; Anderson v. Morice, supra; The Colonial Insurance Co of New Zealand v. The Adelaide Marine Insurance Co., 12 A. C. 128; 56 L. J. C. P. 19.
2 The Annie Johnson, (1918) pp. 154, 161.
3 See Benjamin on Sale, 7th Edn., p. 419.
4 Wancke v. Wingren (1889) 58 L. J. Q. B. 519; Tregelles v. Sewell (1862) 7 H. & N. 574; 126 R. R. 558; Crozier v. Auerbach (1908) 2 K. B. 161, C. A.; Biddel Bros. v. Clemens & Co. (1911) 1 K. B. 934; Tregelles v. Sewell (1862) 7 H. & N. 574.
5 Calcutta Co. v. De Mattos (1863) 32 L. J. (Q. B.) 322; 139 R. R. 752; Depont v. British South Africa Co. (1901) 18 T. L. R. 24.
6 Bevington v. Dale (1902) 7 Com. Cas. 112.
7 Rutter v. Palmer (1922) 2 K. B. 87, C. A.
8 Inglis v. Stock (1885) 10 App.Cas. 263.
9 Cawasjee v. Thompson (1845) 5 Moo. P. C. C. 165, 70 R. R. 27; Wimble v. Rosenberg, (1913) 3 K. B. 743; Inglis v. Stock, supra,
10 A. I. R. 1930 Lah. 469.

Ford Automobiles v. *Delhi motor Co.*,[1] where the sellers had taken the railway receipt in their own name, and had instructed their agents not to part with the receipt except on payment, it was held that the property was with the plaintiffs. But if parties agree that the seller should send the goods to the buyer at the owner's risk, then delivery to the carrier will be tantamount to delivery to the buyer, and in the absence of any indication, the risk will pass also.[2] In *Shanker Das Joti Parshad* v. *Bhana Ram Sheo Dayal*[3], where the defendants sold 814 tins of kerosene oil to the plaintiffs and received Rs. 1,000 in part payment, and defendants had endorsed the railway receipt, (while goods were in transit), and it happened that the goods were destroyed by fire during the transit, it was held that the risk was with the plaintiffs and they could not get a refund of the price from the defendant.

In *Shepherd* v. *Harrison*,[4] goods were "shipped on account of and at the risk of the consignee"; but it was held that by the bill of lading (by which the goods were deliverable to the seller or order) the *jus disponendi* was reserved. In *Sterns Ltd.* v. *Vickers*[5] the acceptance of the delivery warrant by the buyer passed the risk to him irrespective of the fact whether the property in the goods which were not separated from the bulk passed to him.

A stipulation in the contract that payment is to be made after delivery does not prevent the risk from passing and making the buyer liable for the price if the buyer had taken the risk during the transit. In such cases the stipulation as to time is taken to regulate the time of payment, and in case of loss or destruction of the goods, the price is to be paid within a reasonable time thereafter.[6] In *Fragano* v. *Long*[7] there were "goods to be despatched on insurance being effected; terms to be three months' credit from the time of arrival." Held, that though the provision as to payment after arrival would indicate an intention that the seller was to bear the risk during the transit the clause as to insurance indicated that the risk was taken by the buyer.

If it is the intention of the parties that the goods should actually be delivered at their destination before the price is payable the buyer would not be liable if they are destroyed while in the hands of the carrier[8]. So the seller in such case cannot recover the part contingently payable if the goods do not arrive, nor the buyer can recover back the part absolutely payable and paid by him; but, if not paid, he is liable to the seller for such part inspite of the fact that the goods do not reach him[9]. But the mere fact that the price is payable on the delivery of the shipping documents[10] or at a time calculated ...with reference to the arrival of the goods at their

A. I. R. 1928 Bom. 125 =24 Bom. L. R. 1140=70 I. C. 138.

See Alagappa v. Roopchand, A. I. R. 1929 Mad. 685=(1929) 57 M. L. J. 110.

A. I. R. 1926 Lah. 606=7 Lah. 406=97 I. C. 765=27 P. L. R. 601.

(1871) L. R. 5 H. L. 116.

(1923) 1 K. B. 78.

See Calcutta Co. v. De Mattos (1863) 32 L. J. Q. B. 322.

(1825) 4 B. & C. 219.

See Dunlop v. Lambert, (1838) 6 Cl. & f. 600, 621; Dupont v. British South Africa Co. (1922) 2 K. B. 87. The Miramichi 1915, p. 71.

9 Calcutta & Burmah Steam Navigation Co. v. De Mattes 32 L. J. Q. B. 322; Dupont v. British South Africa Co., supra.

10 Anderson v. Morice, supra.

destination[1] or their actual delivery to the buyer[2] or is to be ascertained by weighing or the doing of some act or thing in relation to them after their arrival[3] does not throw the risk during transit on the seller[4] in as much as such provisions may be intended only to regulate the time of payment of the amount of the price, *e. g.* where the other terms of the contract show that the property or the risk was intended to pass to the buyer immediately on the despatch of the goods to him[5].

Where the price of the goods is payable before delivery, and no intention appears in the contract that the price shall be refunded or shall cease to be payable if delivery is not made, and where the seller agreed to deliver the goods only on a contingency which fails without the seller's fault[6]. or the goods being specific the seller is discharged by law from delivering the goods[7] the buyer must bear the risk if delivery is not made to him[8]. Where, however, under an express power, the buyer is given a right to recover the price of the goods from the seller on the happening of a certain contingency and to revest the property in the goods in him and the goods are damaged without any fault of the buyer while they are in the buyer's possession and before he has an opportunity to exercise the right the loss must be borne by the seller as contingent owner of the goods[9].

The completion of the sale confers upon the buyer in respect of the goods all the rights and liabilities of an owner. Subject, therefore, as between him and the seller, to any special agreement, he is invested with full powers of using or of dealing with the goods, is entitled to all accretions and benefits attaching to them, and is subject to the risk of loss or damage. The rights and liabilities of the buyer as owner of the goods may, however, as between him and the seller be limited by special agreement[10]. Such an agreement, however, does not run with the property in the goods so as to bind a subsequent purchaser or so as to qualify his right of property in the goods, even though he has notice of such agreement[11]. This rule, however, does not apply to patenter who can restrict the user of the goods by the buyer or by his subsequent purchaser even without notice, on the sale of the patented goods, by the term of the license[12].

Proviso (1) to section 26—delivery delayed by fault of either party.

1 Fragano v. Long, supra; Hale v. Rawson, 4 C. B. N. S. 85.

2 Haulder Bros. Co. v Public Works Commissioner, (1908) A. C. 276 (291) P C.

3 Castle v. Playford, L. R. 7 Exch. 98.

4 Alexander v. Gardner, I Bing. N. C. 674; Castle v. Playford supra.

5 See also Halsbury, Vol. XXIX 2nd Edn.

6 Whincap v. Hughes, L. R. 6 C. P. 78; Wheeler v. Fradd; 14 T. L. R. 302 C. A.; Oppert v. Beaumont, 3 T. L. R. 674 C. A.

7 See sec. 26, supra.

8 See Halsbury, Vol. XXIX. (2nd Edn.).

9 Head v. Tattersall, L. R. 7 Exch. 7 (14).

10 Elliman Sons & Co. v. Carrington & Son (1901) 2 Ch. 275; Dodsley v. Varley, 12 Ad. & El. 632.

11 Spencer's case, 5 Coke's Rep, 161 (3rd Re.) Spildt v. Bowles 10 East. 279; Thomson v, Daning 14 M. & W. 403; See also Halsbury, Vol. XXIX (2nd Edn.).

12 Incandescent Gas Light Co. v. Cantelo, 11 T. L. R. 381; British Motor Syndicate v. Taylor & Son, (1901) I Ch. 122, C. A.

The *proviso* to section 26 lays down that where delivery has been delayed through the fault of either buyer or seller (and not by an agreement between the parties), the other party should be placed in the same position as if the delivery was made or taken in time and the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The expression "might not have occurred" appearing in the proviso, would seem to throw on the party in fault the onus of proving that even without his fault the loss would have occurred[1].

"Fault" has been defined in section 2 (5) as meaning wrongful act or default. The term "default," like "negligence," is a purely relative term[2]. The fault may consist of failure to deliver the goods as required by the contract or of any other act or omission which the party was bound, under the terms of the contract to abstain from or to do in performance of such terms. Such wrongful act or omission may constitute a tort or a breach of contract; in either case the general rule relating to contracts or torts makes the wrongdoer responsible for the loss caused thereby to the other party. The first proviso to section 26 above enacts only a special case where delivery has been delayed through the fault of either seller or buyer.

Under this proviso it is not necessary, to hold the party in fault responsible for the loss, that there shall be any direct connection between the delay and the loss.[3]

Liability of either party as bailee—*proviso* (2) to section 26.

The second proviso to the section declares that the liability of either party as a bailee of the goods of the other party is not affected by the section. It presupposes that the party in possession is not the owner of the goods, Thus, the seller may be in possession of the goods after the property has passed until the time for delivery has arrived; or the buyer may be in possession under a contract which postpones the transfer of the property, *e.g.* till the price is paid. The case of a bailee on sale or return or on approval is not affected by this proviso, as the bailee not having "agreed to buy," is not a "buyer.".[4]

When the seller remains in possession of the goods after the property in them has passed to the buyer or when the buyer gets possession of the goods before the property passes to him as in the case of goods on trial, the property in possession of the goods is, in either case, a bailee of the other.[5] In the former case, until the expiration of the time fixed, expressly or by implication, for the buyer to take delivery, the position of the seller in possession of the goods is that of a bailee for reward; but after the expiration of such time it changes into that of a gratuitous bailee[6]. Similarly, in the latter case, until the expiration of the time fixed, expressly or by

1 See Chalmers, Sale of Goods Act, 1893, 11th Edn., p. 72.
2. Re Young and Harteon's Contract (1885), 31 Ch. D. 168, C. A., at p. 174.
3 McConthe v. New York & Erie Railroad Co., 20 New York State Reports, 495; See also Halsbury, Vol. XXIX, 2nd Edn.
4. See Benjamin on Sale, 7th Edn., p. 427.
5 Chalmers, p. 73.
6. Koon v. Brinkerhoff, 39 Hun. 130; Wiehe v. Dennis Brothers, 29 T. L. R. 250; Story Ss 300 (A & B) and 303.

implication, for the passing of the property, the buyer, in possession of the seller's goods is a bailee for reward; but after a rightful rejection of the goods and the expiration of a reasonable time for the seller to remove them, the buyer becomes a gratuitous bailee[1]. But where delivery in wrongfully delayed the position of the party in fault is not exactly that of a bailee in fault, but, as pointed out above, is governed by the first proviso to this section making the party in fault liable even in a case where he would have been exempt from such liability if he had been only a bailee for the other party.[1]

The terms "bailee" used in the proviso has the same meaning as in section 148 of the Indian Contract Act[2]. The rights and liabilities of bailees are dealt with in sections 148-181 of the Indian Contract Act.

accretions.

The converse of the rule *res perit domino* also holds goods, and any fruits or increase of the thing sold belong *prima facie* to the party who has the property in it. "Any calamity befalling the goods after the sale is completed must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor[3]."

Transfer of title.

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell: *Sale by person not the owner.*

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Analogous law.

This section with the exception of the proviso corresponds to section 21, of the English Sale of Goods Act, 1893. The proviso of

1 See Halsbury, 2nd Edn., Vol. XXIX.
2 See section 2 (14) ante.
3 Sweeting v. Turner (1871), L. R. 7 Q. B. 310, at p. 313 per Blackburn J.

this section is borrowed from the English Factors Act, 1889, section 2 (1). The principle involved in this section and the next two sections was recognised in India in section 108 of the Indian Contract Act 1872, since repealed. See Appendices A and B.

Sale by person not the owner—history of legislation of section 27.

The Latin maxim *nemo dat quod non habet* expresses the general rule that no man can pass a better title than he has. It is specifically stated in this section that a person buying goods from one who is not the owner thereof and who does not sell them with his consent acquires no better title to the goods than the seller had except in the two cases mentioned therein, one being the case of estoppel, and the other the case of a sale by a mercantile agent in possession of goods with the consent of the owner and having authority either to sell goods, or to consign goods for the purpose of sale, etc.

In England, before the passing of the Factors Acts of 1823. 1825 and 1842, a person in possession of goods or documents of title could not dispose of these goods in contravention of his instructions with respect to them except where—

(1) the sale was in market overt;

(2) the owner of the goods was by his conduct precluded from denying the seller's authority to sell; and

(3) the goods were sold under a statutory power of sale.

The Factors Acts referred to above dealt with the powers of factors and mercantile agents entrusted with the possession of goods or documents of title to goods. The joint effect of those Acts was summed up by Blackburn L. J. in *Cole* v. *North Western Bank*[1] in the following words:

"We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt .....The general rule of law is that where a person is decided by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law that, where a third person has entrusted goods or the documents of title of goods to an agent who. in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent, and makes a purchase from or advance to him without notice that he was not authorised to sell or to procure the advance."

The provisions of the Factors Acts referred to above were thus really an extension of the common law rule of estoppel. Under these Acts, the terms used were simbly "person" or "agent" entrusted with the possession of goods, but it was held that the Acts only applied to mercantile transactions, and that the term "person" or "agent" did not include a mere servant or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party, but only persons whose employment corresponded to that of some known kind of commercial agent like factors.

1 (1875) L. R. 10 C. P. 354, at page 372.

When the Contract Bill was drafted by the Indian Law Commissioners, there were then in force in India, two Factors Acts, one of 1840, and the other of 1844. The Indian Factors Act of 1840 was a reproduction of the English Factors Acts of 1823 and 1825. The Indian Factors Act of 1844 was a reproduction of the English Factors Act of 1842. Both the Indian Acts, like the English Acts on which they were based, related only to pledges. The Acts contained no power of sale. These Acts were subsequently repealed by the Indian Contract Act, 1872, although sections 108 and 178 of the latter Act covered the same ground as the provisions of the Indian Act XX of 1844[1]

Referring to the above clauses Sir Henry Maine observed :

"It cannot be denied that the subject is difficult. We have to consider on the one hand the hardship suffered by an innocent person who loses in this way his right to recover what was his undoubted property. But, on the other hand, still greater weight, appears to us to be due to the hardship which a *bona fide* purchaser would suffer, were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the custody of the property. The conduct of the latter has been blameless. The balance of equitable consideration is, therefore, on the side of a rule favourable to the purchaser ; and we think that sound policy with respect to the interests of commerce points to the same conclusion.

"We have, therefore, provided that the ownership of goods may be acquired by buying them from any person who is in the possession of them, if the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them. Similar provisions have been inserted in accordance, we may observe, with the spirit of the Factors Act—to meet the cases of those who have purchased goods or taken them by way of pledge from persons in possession of any documentary title to the goods, where the circumstances are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell or to pledge the goods."

By some Courts the word "possession" both in sections 108 and 178 of the Indian Contract Act was interpreted as meaning "juridical possession", while by others it has been held to have been used in its literal meaning[2]. The general trend, however, of the decisions had been to confine the operation of both the sections to juridical possession and to sales or pledges by persons whose employment corresponded to that of commercial agents like factors.

It was thus both necessary and desirable to make clear the law both of sales and pledges by apparent owners. Section 108 of the Contract Act has, therefore, been repealed and been replaced by sections 27 to 30 of the Indian Sale of Goods Act, 1893. For this purpose certain provisions of the English Factors Act, 1889, which repeals the previous Factors Acts, have been borrowed. The scope of old section 108 has thus been much narrowed from '*any person in possession of goods*' to '*a mercantile agent in possession.*' The law laid down now is in general conformity with the English law.

The modification of section 108 necessitated an alteration in the companion section 178 of the Contract Act. Accordingly, the Indian Contract (Amendment) Act IV of 1930 has modified old section 178 and added another section 178-A, so as to make the sections correspond in principle to the newly enacted sections[3].

1 See Ramdas v. Amerchand (1916) L. R. 43 I. A. 164, 168, 169 ; 40 Bom. 630, 634.

2 See Haji Rahimbux v. Central Bank I. L. R. 56 Cal. 367, where all the cases on the point are received.

3 See Report of the Special Committee.

Section 27 relates to the sale by a person who is not the owner; section 28 to the sale by one of several joint owners; and section 30 to the sale by the seller or buyer who continues in or obtains possession of the goods with the consent of the other party, after having parted with the property, or before acquiring the property in them as the case may be. Section 29 deals with the effect of a sale by a person who has obtained possession of goods under a contract liable to be avoided by the person from whom he has bought them.

General principle laid down in section 27—*nemo dat quod non habet.*

Section 27 lays down the general rule that no one can give what he has not got; and if one deals with the goods of another without his authority, the transaction is as against that other nugatory in law[1]. The mere fact of an innocent and *bona fide* purchase from a person with no title is no answer to the claim of the true owner. If such a buyer sells the goods to a third person in good faith, and it turns out that the goods were lost or stolen, he would be liable to the original owner in trover[2]. The seller who purports to sell as owner is estopped from denying that he was not the owner at the sale[3]. If he subsequently acquires the title to the goods, such title goes to "feed" the contract, and the property thereupon vests in the buyer[4].

Illustrations.

(1) A finds a ring and after making reasonable efforts to discover the owner' sells it to B, who buys without knowledge that A was merely a finder. The true owner may recover the ring from B[5].

(2) A assigned goods to the plaintiff by bill of sale, but was allowed to keep possession of them upon payment of a weekly rent, and an undertaking to deliver them up on demand. He subsequently sold them to the defendant. The defendant, though he bought in good faith, acquired no title against the plaintiff[6].

(3) Where the hirer of goods under a hire-purchase agreement sells them, the buyer from him, though acting in good faith, does not acquire the property in the goods as against the owner, but, at the most, such interest as the hirer had[7].

(4) A delivers goods on sale or return to B, the condition being that they are to remain the property of A till paid for. B sells them to C, without paying A for them. C buys in good faith and without notice of A's title. A can recover the goods or their value from C[8].

1 See Hollins v. Fowler (1875) L. R. 7 H. L. 757.
2 Stone v. Marsh (1827) 108 E. R. 554; 30 R. R. 420; Lee v. Bayes (1856) 18 C. B. 599; 107 R. R. 424.
3 Edmonds v. Best (1862) 7 L. T. 279.
4 Whitehorn v. Davison (1911) 1 K. B. 463, C. A. at p. 475; Bradley v. Ramsay (1912) 106 L. T. 771, C. A.
5 Farquharson Bros. v. King & Co. (1902) A. C. 325 at pp. 335-336; cf. Cahn v. Pockett's Bristol Channel Steam Packet Co. (1899) 1 Q. B. 643, at p. 658, C. A.
Cooper v. Willomatt (1845) 1 C. B. 672, 68 R. R. 798.
Helby v. Matthews (1895) A. C. 471
Belsize Motor Supply Co. v. Cox (1914) 1 K. B. 244; Whiteley & Co. v. Hilt (1918) 2 K. B. 808, C. A.; Greenwood v. Holquette (1873) 12 B.L.R. 42. Edwards v. Vaughan (1910) 26 T. L. R. 545, C. A.; cf. Khitish Chandra v. Emperor A. I. R. 1924 Cal. 816=51 Cal. 796, 801=82 I. C. 163.

(5) B, falsely representing himself to be T & Co., an *existing* firm, sends a written order for goods to S, who thereupon forwards the goods. The property in them does not pass to B, for there is no contract with anybody, since S intended to contract with T & Co., and not with B, and T & Co. obviously made no contract with S[1].

(6) If in the above illustration, B falsely represents that he is acting as the agent of T & Co., the result is the same[2].

(7) There was a sale of a horse at public auction. Unknown to the auctioneer and the buyer, the horse had been stolen. *Held*, that the buyer obtains no title against the true owner[3].

(8) In *Kingsford* v. *Merry*[4] it was held that the defendant, as innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods by the original seller to himself by falsely representing that a sale had been made to him by the buyer, the court saying on these facts that the original seller and the fraudulent party "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might affirm or disaffirm."

(9) In *Folkes* v. *King*[5] the owner of a motor car delivered it to a mercantile agent to sell on commission subject to a reserve price. The agent sold it to a *bona fide* purchaser below the reserve price and misappropriated the proceeds. The purchaser subsequently sold the car to the defendant. The plaintiff (owner of the motor car) failed in his action to recover the car from the defendant.

(10) A consigned a quantity of cocoa to B by railway, and sent the consignment notes to him. The price, at the time, had not been agreed. Before any agreement was arrived at as to the price, B sold the cocoa to C and handed to him the consignment notes. A was held to be precluded from disputing B's title to the cocoa[6].

(11) An owner of a bus engaged A as his agent to ply the bus for hire and left a letter addressed to the District Magistrate and signed by himself requesting the Magistrate to grant "G" permit to A. The registration certificate of the bus was also left with A who fraudulently altered the letter into one addressed to the D. S. P. requesting him to transfer the registration in his name, which having been done, he sold the bus to a stranger who was ignorant about A's real title. The owner thereupon challenged the buyer's title in legal proceedings. *Held*, that the owner could not have contemplated the possibility of fraud on part of A, and that on the true construction of

1. Cundy v. Lindsay (1878), 3 A. C. 459; 47 L. J. Q. B. 481; Hardman v. Booth (1863), 1 H. & C. 803; Hollins v. Fowler (1875), L. R. 7 H. L. 757; 44 L. J. Q. B. 169.
2. Higgons v. Burton (1857), 26 L. J. Ex. 342; 112 R. R. 938.
3. Lee v. Bayes (1856) 18 C. B. 599, 107 R. R. 424.
4. 1 H. & N. 503; 26 L. J. Ex. 83: 108 R. R. 694.
5. (1923) 1 K. B. 282 (C. A.); 92 L. J. K. B 125.
6. Commonwealth Trust, Ltd., v. Akotey (1926) A. C. 72, P. C.

section 27, he was not precluded from challenging the title acquired by the buyer[1].

Exceptions to the rule.

The rule[2] that the buyer acquires no better title than the seller had is, however, subject to various exceptions The words "subject to the provisions of this Act, and of any other law for the time being in force" refer not only to the provisions of this Act *e. g.* proviso to section 27 and sections 28, 29, 30, and 54 (3) of the Act, but to those provided by other enactments also. Thus, section 176 of the Contract Act gives the pawnee the power of sale under certain conditions, and the competency to pass a better title than he has. Again, under Order 40 of the Code of Civil Procedure, a receiver appointed by court has power to sell and pass all the property in the subject-matter sold. Similarly, executors in whom legal title vests, (as distinguished from beneficial interest), the official assignee in whom the property of an insolvent vests, liquidators of companies—are all persons who can pass a good title though they do not sell as owners or with the consent of owners: and a mortgagor of goods remaining in possession can give a good title to a buyer from him who acts in good faith and without notice of the encumbrance[3], section 169 of the Indian Contract Act gives a power of sale to the finder of lost goods.

Another instance is that of an agent of necessity, usually a master of a ship, who may in cases of necessity sell the ship or cargo[4], and this has been extended to the case of a carrier by land: but a real necessity must exist for the sale and there must be a practical impossibility of obtaining the owner's instructions in time as to what shall be done.[5]

English law of market overt not applicable to India.

Under the English law an important exception to the rule that a person cannot make a valid sale of goods that do not belong to him is to be found in the case of sales made in what is known as "market overt". Section 22 of the English Sale of Goods Act deals with this, and runs as follows:

> "22 (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquries a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

Market overt is held in England by Charter or prescription on special days[6]. In the city of London, every day except Sunday is market day; and every shop in which goods are exposed publicly for sale is a market overt for such goods as the owner openly professes

Mohambaram v. Ram Narayan, A. I. R. 1935 Mad. 850=158 I. C. 585.

(1895) 1 Q. B. 521, C. A.; 64 L. J. Q. B. 308.

See Halsbury, Laws of England, 2nd Edn. Vol XXIX, p. 103; Narasiah v. Venkataramiah (1918) 42 Mad. 59=47 I. C. 976; Backer Khorasanee v. Ahmed Esmail Jamal A. I. R. 1928 Rang. 28=(1927) 5 Rang. 633=106 I. C. 855.

4 See Pollock and Mulla, Commentary on the Indian Contract Act, 6th Edn., 1931, pp 570-574.

5 Sims & Co. v. Midland Ry. (1913) 1 K. B. 103, 112; Springer v. Great Western Railway Co. (1921) 1 K. B. 257, C. A.; see Pollock and Mulla, Sale of Goods Act. p. 156.

6 See Benjamin v. Andrews (1858) 5 C. B. (N. S.) 299; 116 R. R. 677

to trade in. The goods must be openly sold in the presence and sight of any person entering the shop. The shop is not a market overt except for goods usually sold *e. g.* a scrivener's shop is no market overt for plate, Smithfield no market overt for clothes, but only for horses and cattle.

It must also be remembered that the privilege protects only innocent buyer; the seller, however innocent, is not protected from liability.

The framers of the Indian Act rejected the rule relating to market overt as being unsuitable to Indian conditions[1]. Even at the time of the passing of the Indian Contract Act in 1872 it was observed that to do so would make British India an asylum for cattle stealers from Indian States[2].

Principle of estoppel—"unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The first para. of this section is based on the principle of personal estoppel. It is well established that if one person by his words or conduct induces another to believe in the existence of a state of circumstances and to act on that belief so as to alter his position, he cannot aftertwards aver a different state of things against the party whom he has misled[3]. Thus, the lessee of a public house who allowed another to sell the fixtures and fittings as if they were his own, whereby a third person was induced to purchase them *bona fide*, cannot recover them from the purchaser[4]. "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving[5].

Estoppel may also arise by the owner assisting the sale[6], or by permitting "goods to go into the possession of another with all the insignia of possession thereof and apparent title[7]."

In *Woodley* v. *Coventry*[8] the defendants sold corn to a third party who, having got advances from the plaintiff on the security of the goods, gave plaintiff a delivery order on the defendants. The plaintiff lodged the delivery order with the defendants and sold the goods to different persons. After a part had been delivered, the third party absconded, and defendants refused further delivery to the plaintiff. In plaintiff's action for trover, the court held that the defendants were estopped from denying that property had passed to the third party. In a later case, on similar facts, it was held that there was an estoppel even where the second buyer had paid the price before presenting the delivery order, on the ground that his position was altered through the defendant's conduct, because he was

1 See Report of the Special Committee.
2 See also Report of the Select Committee.
3 Pickard v. Sears, 6 Ad. & E. 469.
4 Gregg v. Wells (1839) 10 A. & E. 90, 50 R. R. 347.
5 Ibid v. per Lord Denman.
6 Waller v. Drakeford (1853), 1 E. & B. 749; 93 R. R. 377.
7 Commonwealth Trust v. Akotey, supra.
8 2 H. & C. 164; 32 L. J. Ex. 185.

induced to rest satisfied that the property had passed and to take no steps for his own protection[1].

The rule as to estoppel contained in section 27 is only an application of the general rule of estoppel in section 115 of the Indian Evidence Act, 1872. It was laid down by Ashurst J. in *Lickbarrow* v. *Mason*[2], decided so long ago as in 1787 that whenever one of two innocent persons must suffer by the acts of a third, he who has ***enabled*** such third person to occasion the loss must sustain it. This rule, though generally followed[3], has latterly been qualified by limitations put on the word "enabled" so as to import some act of the owner which has ***misled*** the innocent purchaser *i. e.* "an act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel[4]." In *Mercantile Bank* v. *Central Bank*[5], the Central Bank which used to advance moneys to a merchant on the pledge of railway receipts was accustomed in the usual course of business to hand back the receipts to the merchant for clearing the goods. The merchant, instead of doing so, repledged the receipts with the Mercantile Bank. On the merchant's failure, a question of priority arose between the two banks with regard to some railway receipts which had been fraudulently pledged in succession with both banks. An estoppel by conduct or negligence was sought to be raised against the Central Bank on the authority of *Lickbarrow* v. *Mason as* applied in *Commonwealth Trust Company* v. *Akotey*. It was held by the Judicial Committee that the Central Bank owned no duty to the Mercantile Bank in the matter, there being no relationship of contract or agency between them and that estoppel by representation did not exist in the case, inasmuch as the railway receipt was in form merely an authority to take delivery of goods and possession of it contained no representation as to any authority in the holder.

Similarly, a registered owner of shares by merely handing over the share certificates and blank transfers signed by him to another person has been held not to make a representation to the world that such person is entitled to deal with the shares[6].

Mere carelessness on the part of the owner of the goods in guarding them will not create an estoppel ; it is necessary that the owner should have done some act on which the buyer relied and misled him by that act, or, as it is also put, that the owner should have done some act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel. Thus, where a firm of timber merchants kept stocks of timber warehoused in their own name with a dock company. to whom they gave instructions to accept all delivery orders signed by their clerk ; and the clerk, who had authority from the timber merchants

1 Knights v. Wiffen (1870) L. R. 5 Q. B. 660 ; Dixon v. Kennaway (1900) 1 Ch. 838 ; see also Pickard v. Sears (1837) 6 A. & E. 469 ; 45 R. R. 538 ; Seton v. Lafone (1887) 19 Q. B. D. 68, C. A. ; Weiner v. Gill (1906) 2 K. B. 574, at p. 582, C. A. ; Simm v. Anglo-American Telegraph Co. (1879) 5 Q. B. D. 188, pp. 215-216, C. A.

2 (1787) 2 T. R. 63, at p. 70.

3 See Commonwealth Trust v. Akotey (1926) A. C. 72.

4 See Mercantile Bank v. Central Bank, A. I. R. 1938 P. C. 52 = 1938 Mad. 260.

5 supra.

6 Abdul v. Hasanali, A. I. R. 1926 Bom. 338 = 50 Bom. 229 = 96 I. C. 305 ; see also Mohambaram v. Ram Narayan, A. I. R. 1935 Mad. 850 = 158 I. C. 585 supra.

to sign delivery orders in relation to sales to their customers, fraudulently gave delivery orders in favour of himself under an assumed name, and having procured timber from the dock company sold it to strangers; it was held that the clerk could give no better title than he had himself, and that no question arose of the timber merchants being estopped from denying his authority to dispose of the timber[1].

Sale by a mercantile agent—proviso to section 27.

The important proviso to this section is based on section 2 (1) of the English Factors Act. 1899; but deals only with the power of a mercantile agent to sell the goods; his power to pledge them (which is also dealt with by the above section in the English Factors Act) being the subject-matter of section 178 of the Indian Contract Act. The point to be noted is that while the wording of the Factors Act and section 178 of the Indian Contract Act is "where a mercantile agent is with the consent of the owner in possession of goods or *the documents of title to goods*," in this section the wording is "*a document of title* to the goods", The difference between the two, however, is not clear.

The term "mercantile agent" is defined in section 2 (9) of the Act and may be referred to. It means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

Essential conditions for the application of the proviso to section 27.

In order that the proviso may apply several conditions are necessary.

(1) *The agent effecting the sale must be a mercantile agent.*

The expression "mercantile agent" has been defined in section 2 (9) of the Act and may be referred to[2]. The agent effecting the sale must be a mercantile agent; a sale by a mere clerk or shopman, for instance, would not be within the proviso[3]. The relation of a dealer and a broker is that of a principal and agent and not of a seller and buyer. The extent of the authority of the agent is to be found in the document under which the goods are delivered to him. Where the owner of cetrain diamonds gives them to a broker to be shown to intending purchasers for approval only, it cannot be held that the broker is a mercantile agent within the meaning of the Sale of Goods Act having general authority to sell.[4]

1. Farquharson v. King (1902) A. C. 375; see also Heap v. Motorists' Advisory Agency (1923) 1 K. B 577, 587; Union Credit Bank v. Mersey Docks and Harbour Board (1899) 2 Q. B. 205, C. A.; Henderson v. Williams (1895) 1 Q. B. 521, C. A.; Laurie & Morewood v. Dudin (1926) 1 K. B. 223, C. A.
2. See pages 13 and 42 to 44.
3. Cf Heap v. Motorists' Advisory Agency, Ltd., (1923) 1 K. B. 577; Shankar v. Mohanlal (1887) 11 Bom 704; Ramasami Gupta v. Kamalammal, A. I. R. 1922 Mad. 44=45 Mad. 173=70 I. C. 448.
4. Amritlal v. Bhagwandas, A. I. R. 1939 Bom. 435.

Jangad transaction It was held in *Emperor* v. *Phirozshah Maulkji Gandhi*[1] that a *jangad* transaction (usually occurring in Bombay) is a "sale or return" and involves a representation that the purchaser will (a) signify his approval or acceptance of the goods and pay for it; and (b) if not, return the same within the period fixed, or where no time is fixed on the expiration of a reasonable period. But until one or the other condition is fulfilled, no property passes to the buyer' In such a transaction the owner of the goods gives credit to the deliveree, though it is subject to certain conditions.

In a recent case reported as *Amritlal* v. *Bhagwandas*[2] it has been held that the goods entrusted *jangad* are not goods to be sold on approval but rather goods to be shown for approval and the term "jangad" does not mean "sale or return". In this case certain goods were delivered *jangad* by the owner to a broker. According to the printed terms the broker admitted that he received the goods only for the purpose of showing them to intending purchasers that he had no authority whatsoever to sell, mortgage or pledge the goods; that the ownership of the goods remained all along in the owner and he had no right to or interest in them; and that till the goods were returned in the condition in which they were received or if they were not returned, he was liable and responsible for the same. *Held*, that the broker was not a mercantile agent within the meaning of section 27.

Held, further,

(1) The relation of a dealer and a broker is that of a principal and agent and not of a seller and a buyer.

(2) When in one document there are printed as well as written conditions, the Court's duty so far as possible is to reconcile all the terms; but, when that is not found possible, the written conditions are to be given greater weight than the printed ones.

(3) Even if goods are delivered to broker on *jangad* terms, no property can pass to him under section 24.

(4) Goods or jewellery may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purchase it. The goods in such cases are stated to be delivered for approval *i. e. jangad*. Section 24 covers that situation. Goods may be handed over to a mercantile agent also "jangad" meaning to be shown for approval to his customers. Under those circumstances, if the mercantile agent effects a sale, the purchaser is protected under section 27 of the Act provided there is no want of good faith. The mercantile agent who receives goods on *jangad* acquires no property by reason of section 24 because he is not a buyer. He has therefore no title to pass on the property by reason of section 24. The third contingency is where the owner delivers goods to an agent (who is not a mercantile agent falling within the definition of that expression as given in the Sale of Goods Act) on terms arranged between the owner and the agent. As one of the terms of delivery, the goods may be given *jangad i. e.*, for approval by a prospective customer or to be

1 A. I. R. 1934 Bom. 360=58 Bom. 646=152 I. C. 706.

2 A. I. R. 1939 Bom. 485.

shown for approval. To such a case neither section 24 nor section 27, Sale of Goods Act, applies and the extent of the authority of the agent depends on term of his agency, and the provisions governing the relations of principal and agent as found in the Contract Act. It is clear that in that case also no property passes from the owner to the agent under section 24 nor is a sale by him protected under section 27. If this authority enables him to sell the goods, the sale is authorized and binding on the owner. If the authority is exceeded, the question will have to be considered in the light of sections 227 and 228, Contract Act.

(2) *The mercantile agent must be in possession of the goods or of a document of title to the goods.*

As has already been observed the meaning of the word "possession" occurring in sections 108 and 178 of the Indian Contract Act was not clear and was interpreted in different ways by the Courts. Under the present section it is clear that the possession should be the possession of a mercantile agent who in the customary course of his business as such agent has authority to sell, consign for sale, buy or raise money on the security of goods, and does not refer to the possession of "any person". The "possession" is, therefore, one "which is unqualified, and not to be restricted otherwise than by the owner giving instructions to the person who has it[1].

The possession of the agent must, however, should be *qua* mercantile agent. If he receives the goods, not as a mercantile agent but in a different capacity, the section does not apply. Thus, where goods were in the possession of a warehouseman who also happened to be a broker it was held that he could not validly pledge them in his capacity as a broker[2]

Does "possession" mean actual physical custody? Section 1 clause (2) of the English Factors Act, 1889, states:

"A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf

(3) *Such possession must be with the consent of the owner.*

The mercantile agent must have obtained possession of the goods or of a document of title to the goods with the *consent* of the owner. The owner is the person whose authority to sell is necessary. The pledgor and pledgee may in certain circumstances become the joint owners and then their consent to the sale would be sufficient[3]. Section 27 of the Act, which deals with the transfer of title incorporates the well-known rule that a person who is not the owner of goods and who does not sell them under the authority or with the assent

See Greenwood v. Halqnette (1873) 12 B. L. R 42, 46; Roop Chand Janki Das v. The National Bank of India (1918) 46 Cal. 342=48 I. C. 975; Singer Manufacturing Co., Lahore v. Niaz Ali, 54 P. R. 1919=46 I. C. 888; Ahmad Jan v. Singer Sewing Machine Co., A. I. R. 1921 Lah. 228=67 I. C. 686; Shankar v. Lakshmibai, A. I. R. 1928 Bom. 225=109 I C 787; See also Haji Karim v. Central Bank of India, A I R 1929 Cal. 497=56 Cal. 867 for a different view.

Cole v. North-Western Bank (1875) L. R. 10 C. P. 354, Ex. Ch., at p. 373.

See Lloyds Bank Ltd. v. Bank of America National Trust and Savings Association (1938) 2 K. B. 147.

of the owner cannot give to the buyer a better title than the seller himself has. Even in the case of a mercantile agent, it must be shown that he was in possession of the goods with the consent of the owner; if that is not shown, the words of the proviso to S. 27 will not apply even apart from the question of good faith and notice[1].

It was held in England under the earlier Factors Act, that where the agent by fraud induced the principal to "entrust" him with the goods or documents of title, the agent could none the less give a good title to a *bona fide* purchaser[2] : and these cases are still good law, so that the consent of the owner to the agent's possession is void though it may have been obtained by fraud.[3]" However fraudulent the person in actual custody may have been in obtaining the possession, *provided it did not amount to larceny by a trick,* and however grossly he may abuse confidence reposed in him, or violate the mandate under which he can by his disposition give a good title to the purchaser[4]."

Previously distinction was made between 'fraud' and 'larceny by trick' and it was observed in *Cole* v. *North Western Bank*[5] : "If the fraud amounts to larceny by a trick, it is a very doubtful question whether the mercantile agent can be said to be in possession of the goods with the consent of the owner." But this distinction has been objected to in latter decisions and Channel J. pointed out in *Oppenheimer* v. *Attenborough*[6] :

"If the consent exists in fact, it is no answer to say that it has been obtained by fraud. It is difficult to understand why a different rule should apply, if fraud amounts to larceny. There is no case which is a direct authority that larceny by a trick takes a case out of the Factors Act.

Thus, a *bona fide* purchaser from a motor-car agent, who is entrusted by the owner with the sale of a motor-car on commission, subject to a reserve price, gets a good title to the car, even if the agent sells it below the reserve price and misappropriates the money[7].

In India such consent by fraud would probably be not valid, in view of sections 14 and 19 of the Indian Contract Act, though it is arguable that there is nothing in the present Act to compel interpretation of consent as free consent."

Where consent subsequently revoked

In English law, section 2, clause (2) of the Factors Act provides as follows :

"Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid notwithstanding the determination of the consent, provided that the person taking under the disposition has not at the time thereof noticed that the consent had been determined."

1. Amrit Lal v. Bhagwan Das, A. I. R. 1939 Bom. 485.
2. See Baines v. Swainson (1863) 4 B. & S. 270, 129 R. R. 741; Vickers v. Hertz (1871) L. R. 2 Sc. App. Cas. 113.
3. Lowther v. Harris (1927) 1 K. B. 393.
4. Per Collins, L. J. in Cahn v. Pockett's Bristol Channel Steam Packet Co., (1899) 1 Q. B. 643 (659).
5. (1875) 10 C. P. 354.
6. (1907) 1 K. B. 510 (affirmed on appeal in (1908) 1 K. B. 221 ; see also Staff Motor Guarantee Ltd. v. British Waggon Co. Ltd. (1934) 2 K. B. 305; Folkes v. King (1923) 1 K. B. 282; London Jewellers v. Sutton (1934) 50 T. L. R. 193.
7. Folkes v. King, supra.

In *Moody* v. *Pall Mall Deposit Co*[1] where a lot of pictures were sent to a dealer in pictures for sale and he pledged them after the authority to sell had been revoked, it was held that the buyer who had no notice of revocation got a good title.

The Indian Act is silent with regard to the case where the consent originally given is subsequently revoked, as to whether the seller would be competent to transfer title to a *bona fide* purchaser after such revocation, though the principle of *Moody* v. *Pall Mall Deposit Co.* seems to be applicable in India also.

(4) *The mercantile agent must be acting in the ordinary course of business of a mercantile agent.*

For application of the proviso to section 27, the mercantile agent must be acting in the ordinary course of business of a mercantile agent. It is to be observed that in the definition of "mercantile agent" in section 2 (9) of the Act, the words 'as such agent" occur while the proviso to section 27 refers only to "a mercantile agent." These words were interpreted in *Oppenheimer* v. *Attenborough*[2]. In that case a broker obtained some diamonds falsely pretending that he had a customer for them. He did not dispose of them to a customer but pledged them with the defendant. who acted in good faith. The evidence was that by the custom of the diamond trade, brokers have no authority to pledge. It was, however, held by the trial judge that the words "a mercantile agent" gave the agent a general authority which could not be cut down by any particular trade custom and he accordingly gave judgment for the defendant. This decision was affirmed by the Court of Appeal. Lord Alverstone, C. J., expressing the opinion that "acting in the ordinary course of business as a mercantile agent" meant that he "must act in the transaction as a mercantile agent would act as if he were carrying out a transaction which he was authorized by his master to carry out" (at page 227); while Buckley, L. J (at pp. 230, 261) interpreted those words as meaning "acting in such a way as a mercantile agent in the ordinary course of business of a mercantile agent would act; that is to say, within business hours at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the person (dealing with him) to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make." When he is so acting, therefore, he has an ostensible authority given by the Act. which cannot be limited by private instructions or a particular trade custom.

In *Heap* v. *Motorists' Advisory Agency. Ltd.*,[3] a person by falsely representing that he knew of a possible purchaser for a car belonging to the plaintiff, obtained possession of the car and subsequently secured an appointment as car salesman to a firm of motor engineers and in this capacity, effected a sale of the car. It was held that the sale was not in the ordinary course of business of a mercantile agent, and it was for *the party claiming the benefit of*

1 (1917) 33 T. L. R. 306.
2 (1908) 1 K. B. 221 (230).
3 (1923) 1 K. B. 577.

the section to prove that the sale was in the ordinary course of business.

(5) *The buyer must act in good faith and without notice of the want of authority.*

It is also essential under this proviso that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell. In order that the buyer may be absolved of his liability for having purchased goods from person not owner thereof and in order that the plea of purchase in good faith may be available to him, he must bring his case within the proviso to section 27[1]. Section 3, clause (20) of the General Clauses Act, 1897, defines "good faith" as follows :

"A thing is deemed to be done in good faith, when it is in fact done honestly whether it be done negligently or not[2]".

Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequences[3].

If the buyer has notice that the seller's title is defective, he cannot be said to be acting in good faith. The notice required by this section need not necessarily be actual notice. It may be constructive. Therefore where the buyer's agent has had notice or where the buyer desists from making an inquiry suspecting some defect in the title, he may not be entitled to the benefit of this proviso. It has, however, been held that mere suspicion is not enough and will not amount to notice[4]. Where there are two or more joint buyers, a notice to one of them would be tantamount to notice to all[5].

Although a party may have acted in good faith yet if his agent knows that the pledger was warehouseman and a merchant and was thus put on enquiry, the principal is affected thereby and is guilty of conversion if he refuses to return goods, pledged to him, to their owner.[6] Either knowledge or means of knowledge to which the party wilfully shuts his eyes is enough[7], but not mere suspicion. To establish notice it is sufficient to show that the circumstances attending the transaction were such as a reasonable man of business[8], applying his understanding to them would certainly know that the agent had not authority to sell although he was not acting *mala fide* towards his principal[9]. So, where a seller drew a bill of lading in six parts and endorsed and transferred three to B and A, to secure an advance, and inadvertently sent one endorsed bill to his buyer who pledged it with Bank B, in a suit by Bank B, against Bank A, for the goods it was held that though the pledge to Bank B, was

1 Ma Sein v. Maung Ba Hmu, A. I. R. 1936 Rang. 383= 164 I. C. 1100.

2 See also section 62 (2) of the English Act.

3 Jones v. Gordon (1877) 2 App. Cas. 616, at p. 629.

4 Navulshaw v. Brownrigg (1852) 42 E. R. 943 ; 95 R. R. 156.

5 Oppenheimer v. Frazer (1907) 2 K. B. 50 ; Ramasami Gupta v. Kamalammal, A. I. R. 1922 Mad. 44—70 I. C. 448.

6 May v. Chapman, 16 M. & W. p. 361.

7 Navulshaw v. Brownrigg, 21 L. J. Ch. p. 914. Gobind Chunder v. Ryan, 9 Moo. I. A. 140 ; Lord Sheffield v. London Joint Stock, 13 App. Cas. 333 H. L.

8 This standard of reasonable man is good as regards notice but not as regards good faith. Whitehorn v. Davidson, 80 L. J. K. B. p. 427.

9 Ibid.

prior to that with Bank A, yet as Bank B, must have known that there were six bills, and were not deceived by the buyer's possession of one bill only, they had no right of priority.[1] The doctrine of constructive notice should, however, be very sparingly applied to mercantile transactions.[2] But if one of two or more partners has notice of the fact that the seller has no power to sell or that the transaction is improper, the other partner or partners acquire no title under a disposition by a factor, even if the partnership is merely for that individual transaction[3]. Similarly if an agent obtains information in the course of his employment as such for the principal that the seller has no authority to sell a purchase made by the principal does not convey any title to him.[4]

The burden of proof that the purchaser had notice of the want of authority, however, lies on the person who seeks to avoid the transaction on that ground[5]. Proof of circumstances which ought to put the agent or principal having notice of them on enquiry is sufficient,[6] but the proof of mere suspicion is not enough[7]. Notice of the existence of a power of attorney is notice of its contents.[8]

28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by one of joint owners

Sale by one of several joint owners.

This section reproduces in substance S. 108, Exception 2 of the Indian Contract Act, 1872. There is no corresponding section in the English Sale of Goods Act, 1893. Under English Common Law a co-owner in the absence of estoppel or authority from the other co-owners could only transfer his own share[9]. If one co-owner sells and retains the whole price the remedy for the others at law against him is doubtful; unless the sale confers a good title to the whole[10].

The rule laid down in this section constitutes the fourth exception to the general rule that no one can give a better title to his transferee than he himself has. Generally the possession of one co-owner is the possession of all and every co-owner who is in possession of a chattel owned jointly by several co-owners holds it generally as an agent for his other co-owners. If he is in possession with the *permission* of his co-owners and not against their wish or with a claim of adverse title so as to negative the idea of agency a person dealing with him in good faith without notice of the want of

1 Gilbert v. Guignon, 8 Ch. A. 16.
2 Kellenback v. Lewis, 24 Ch. D. 54.
3 Oppenheimer v. Fraser, (1917) 2 K. B. 50 C. A.
4 Section 229, Indian Controct Act; Bresses v. Norwood, 14 C. B. N. S. 574. As to when and how far notice to the agent is notice to the principal, see author's Law of Agency, p. 510.
5 See Whitehorn v. Davison (1911) 1 K. B. 463 C. A.
6 Nandlal v. Bank of Bombay, 12 Bom. L. R. 316.
7 Whitehorn v. Davison, supra.
8 Jonmenjoy v. Watson, 10 Cal. 901, P.C.
9 Exp. Barnett, Re Tamplin, 7 Morrell, 901.
10 Chalmers, p. 78.

authority is protected by this section. If, on the other hand, possession is not permissive but against the wish of the other co-owners the mere fact that the buyer acts in good faith without notice of the want of authority will not give him a good title to the goods purchased.

Permission, however need not be express in every case but can be presumed from or implied in the circumstances of a particular case where such presumption or implication can be reasonably made or such inference is reasonably possible. The use of the word permission in this section does not appear to be intended to carry any other meaning than 'consent' in the proviso to section 27, *supra*.

Where a Burman husband and wife are joint owners of property, a *bona fide* purchaser of the property from the husband who is in possession of the property, acquires a good title thereto.[1] So also where one member of a joint Hindu family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is not that he was in possession of it as separate property acquired by him but as a member of a joint family, and if a person buys goods *bona fide* from such a member he acquires the property in the goods, even though the seller had no authority to sell[2]. One of several co-owners who holds a jewel in his safe custody is a person in such possession as is contemplated by this rule[3].

Explaining the position of co-owners under the English law, Sir Mackenzie Chalmers observes[4]:

"The law relating to co-owners, who are not partners, is rather obscure. Probably, a co-owner, in the absence of estoppel or authority from the other co-owners, could only transfer his own share. If one co-owner sells and retains the whole price, the remedy of the others at law against him is doubtful, unless the sale confers a good title to the whole. If co-owners cannot agree as to the possession or use of the goods owned in common the only remedy was to apply in equity for an injunction or for a receiver and sale, but now by section 188 of the Law of Property Act, 1925, the court has power on the application of persons interested in a moiety or upwards of such chattels to order a division. In a case in 1892, A sold half a share in a gold snuff box to *B* on the terms that A was to retain possession till sale on joint account, and afterwards handed the box *B* to sell it as Christie's. *B*, instead of selling, deposited the box with *H*, to whom he owed" money. Held that *A* could recover the box from *H*[5]."

Sale by person in possession under voidable contract

29. When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

1. (1892-96) U. B. R. 308.
2. Taruck Chunder Poddar v. Jodeshur Chunder Kondoo (1873) 11 B.L.R. 193.
3. 1 P. R. 1895.
4. Sale of Goods Act, 11th Edn. p. 78.
5. Nyberg v. Handelaar, (1892) 2 Q. B. 202, C. A.

Sale by person in possession under voidable contract.

This section is based on section 23 of the English Sale of Goods Act, 1893, and on Exception 3 to section 104 of the Indian Contract Act, 1872 (See Appendices), with the omission of the clause relating to offences at the end of the first paragraph and of the whole of the second paragraph.

The Legislature has confined the application of the rule contained in this section only to those cases in which the contract is voidable under sections 19 or 19-A of the Indian Contract Act, 1872. The last words of exception 3 of section 108 of that Act having become redundant have been left out. The phraseology of section 23 of the English Act, which applies to persons holding voidable titles in general, has also been changed. The Indian Act uses the words 'where the seller has obtained *possession* under a voidable *contract*,' and this makes possession of the goods on the part of the seller absolutely necessary. The English Act uses the words 'When the seller of goods has a *voidable* title thereto.'

A voidable contract is one which is induced by coercion, undue influence, fraud or misrepresentation. Such a contract is voidable at the option of the party whose consent was so caused[1]. If such consent was caused by misrepresentation, or silence fraudulent within the meaning of section 17 of the Indian Contract Act, the contract is not voidable, if the party seeking to avoid it had the means of discovering the truth with ordinary diligence And if the fraud or misrepresentation did not cause the consent of the party on whom the fraud was practised, or to whom the representation was made, the contract is not rendered voidable[2].

The contract must be voidable and not void. Where goods have been obtained by fraud the person who has obtained these may either have no title at all, or a voidable title, according to the nature of the transaction, If the nature of the fraud be such that there never was a contract between the parties (as for instance, if A obtains goods from B by falsely pretending to be X's agent, though buying on his own account) then the person who so obtains the goods has no title, and can give none. In this case also there is no contract between A and B. But if A buys goods from B and the price is paid partly in cash and partly by giving a bill purporting to be accepted by X, and A then sells the goods to C, and it turns out that X was a fictitious person and that B was defrauded, there is a contract which B may affirm or rescind at his option. In other words, to use the language of exception 3, there is a contract voidable at the option of the other party thereto. Contract must be voidable and not void

But the contract is procured by A by cheating B, and cheating is an offence under section 415 of the Indian Penal Code. The contract having been procured by an offence the property in the goods did not, under Exception 3 to section 108 of the Indian Contract Act (the law existing before the enactment of the present law) pass to A, though it does under the English law. In the present

1 Vide sections 19 and 19-A of the Indian Contract Act, 1872.

2 See Exception and Explanation to section 19, Indian Contract Act.

section, as already noted, the provision relating to the penal clause has been omitted. At the same time to make it quite clear to what cases section 29 applies sections 19 and 19-A of the Indian Contract Act have been specifically referred to.

If the contract was originally void, either for want af consent or for any other cause, then no ownership would pass to the seller who will, therefore, be incompetent to transfer title to the buyer, though acting in good faith[1]. The effect of fraud is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance the property passes in the subject matter"[2]. A title, therefore, acquired for valuable consideration and in good faith by a third party during the time while the contract stands and is not avoided will not be interfered with[3].

There must be a *de facto* contract.

There must be a *de facto* contract though induced by fraud, etc. No title could be transferred if the goods are obtained by fraud or extortion as defind in the Indian Penal Code without any contract. Thus a thief cannot transfer a good title[4].

Illustrations

(1) In *Cundy* v. *Lindsay*[5] the seller being misled by C supplied him with goods thinking him to be B with whom seller had dealings. It was held that there was no contract with C as there was no consensus of mind which could lead to any agreement or any contract whatsoever, and C could not transfer any title to a sub-purchaser from him. It was observed by Lord Cairns : "If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has supposed to pass the property to him from the owner of the property, then the purchaser will obtain a good title even although afterwards it should appear that there were circumstances connected with the contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

(2) B induces A to send his jewellery on approval by falsely representing that he has a good customer for it. He then pledges the goods whith C. B then induces A to invoice the goods to him, representing that C requires credit. In an action by the plaintiff to recover the goods from the defendant, who had taken them in good faith, it was held that—

See section 20, Indian Contract Act ; Higgons v. Burton (1837) 26 L. J. Ex.) 342, 112 R. R. 938 ; Hardman v. Booth (1863) 1 H & C. 803 ; 130 R. R. 784 ; Cundy v. Lindsay (1878) 3 App. Cas. 459—cases relating to fraud.

Stevenson v. Newham (1853) 13 C. B. 285, [illegible] 93, R. R. 532, Ex. Ch.

See Clough v. L. & N. W. Rly. (1871) L. R. 7 Ex. 26, Ex. Ch. ; Ex parte Ward (1905) 1 K. B. 465 ; Tilley v. Bowman (1910) 1 K. B. 745.

4 See Khitish Chandra v. Emperor (1924) 51 Cal. 796, 801. See also Report of the Select Committee.

5 (1878) 3 A. C. 459. See also Nanka Bruce v. Commonwealth Trust (1926) A. C. 77.

(a) A having obtained the right to transfer the property in the goods, had obtained them under a contract which though voidable by the plaintiff, had not been avoided at the time of the pledge to the defendant, and,

(b) in any event the title of A was perfected by the sale to him, at any rate for the time being, and that went to make the title of the defendant: and consequently the plaintiff's action failed[1].

(3) Where goods had been obtained on false pretences, and the guilty party had been convicted, it was held that the title of the original owner could not prevail against the rights of a pawnbroker, who had made *bona fide* advances on them to the fraudulent possessor[2].

(4) A, trading under the name of B & Co, ordered goods from the plaintiffs, and having obtained delivery of them resold them to the defendants. There was no such firm as B & Co., and A adopted the name fraudulently for the purpose of representing that he was doing a large business. The plaintiffs, not having been paid for the goods, brought trover against the defendants. It was held that the plaintiffs had made a contract with A, and the defendants had obtained a good title to the goods[3].

(5) In *Hardman* v. *Booth*[4] goods were sold to G & Co. through the fraud of their clerk G. & Co. having no knowledge of the sale and the seller believing he was dealing with G and Co. The clerk then pledged the goods against advances made to him. It was held that there was no contract and the seller could recover the value of the goods from the pledgee.

(6) A *bona fide* purchaser from the person obtaining it by fraud can transfer a good title to another having notice of the fraud to which he is not a party[5].

(7) Where no contract has come into existence, for example, where the seller or pledgor has received the goods on "sale or return," approval, or similar terms, and at the time of the sale or pledge the property has not passed to him[6], or where A by falsely pretending that he is buying for B has obtained goods from C as the owner's rights are not divested, this section has no application[7].

Person identified by sight and hearing

(8) Lord Haldane observes in *Lake* v. *Simmons*[8] as follows:

"Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all or as to whether there is an intention to contract with a *de facto* physical individual, which

1 Whitehorn Bros. v. Davison (1911) 1 K. B. 463, C. A.; See also Tilley v. Bowman, (1910) 1 K. B. 745; 79 L. J. K. B. 547.
2 Parker v. Patrick (1793) 5 T R. 175.
3 King's Norton Metal Co. v. Edridge, Merrett and Co (1897) 14 T L. R. 98, C. A.
4 (1863) 32 L. J. Ex. 105.
5 Pierce v. Loudon House, etc., 1922 W. N. 170.
6 See section 24; Truman v. Attenborough (1910) 26 T. L. R. 601; Whitehorn Bros. v. Davison, supra; Folkes v. King (1923) 1 K. B. 282, C. A.
7 Higgons v. Burton (1857) 26 L. J. Ex. 342; 112 R. R. 958; Morrisson v. Robertson (1907) 10 F (Ct. Sess.) 882.
8 (1927) A. C., at p. 501.

constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (Traite des obligations, section 19) lays down the principle thus in a passage adopted by Fry J. in *Smith* v. *Wheatcroft*[1]: Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract......On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand. In the careful judgment delivered by him in *Phillips* v. *Brooks*[2], Harridge J. decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and looked at and selected certian jewels, which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer who drew a cheque pretending to be some one else and signing it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. Harridge, J. found, as a fact. that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Mr. Justice Holmes says at the beginning of the ninth lecture in his book on the Common Law, no contract, because there is really only one party."

'Voidable title' under English law

The expression "voidable" title used in section 23 of the English Act which is the basis of this section has been construed to mean a title acquired under a *de facto* contract purporting to pass the property but which is liable to be set aside, for example, on the ground of fraud[3]. A voidable title constitutes a real ownership as distinguished from merely an apparent ownership. It should be distinguished from a void title. for example, where fraud altogether nulifies the consent to a contract and so creates no title at all as where there is mistake as to the identity of the person contracted with[4], or where a person professing to be agent for a named person, with whom alone the owner proposes to deal, obtains fraudulent possession of the goods.[5] A title may be voidable not only

1 (1878) 9 Ch. Div. 228, 230.
2 (1919) 2 K. B. 243.
3 Cundy v. Lindsay, 3 App. Cas. 459 (464); Kingsford v. Merry, 11 Exch. 577 (579).
4 Cundy v. Lindsay, supra.
5 Higgons v. Burton, 26 L. J. Ex. 342; Morrison v. Robertson supra.

with respect to a limited interest therein, as, for example, where the seller of goods has fraudulently obtained possession of them from a person having, as against him, a special property therein.[1] An ownership voidable in part is treated similarly as one voidable as to the whole[2]. The section does not seem to be confined to avoidable contracts of sale as it has been intorpreted in certain quarters[3], but seems to apply to all voidable contracts which confer a voidable title on the contractee[4].

Under the English law, the cases seem to fall into three classes: (a) where there was a contract, but the possession was not really transferred in pursuance of it; (b) where there was really no contract at all; and (c) where there was a contract and possession was transferred in pursuance of it, although the contract was induced by fraud.

Under class (a) come those cases in which a person, by falsely representing that he is authorised to receive the goods on behalf of the purchaser obtains possession of them, and cases in which there is a mistake as to the identity of the thing transferred.[5] Under class (b) fall cases in which the owner has been led to suppose, contrary to the fact, that he has made a contract, and consequently parts with the possession[6], and cases in which the apparent contract turns out to be no contract at all[7], which include cases in which the owner has been misled as to the identity of the person with whom he is dealing[8]. Under this head fall also cases of an apparent contract of bailment, in which the owner parts with the possession intending that the transferee should hold them as his bailee, while the transferee takes them intending to misappropriate them contrary to the known intention of the transferor.

Under class (c) fall cases in which the owner not only parts with the possession, but also intentionally gives the transferee power either to pass the property to a third party or to acquire it for himself, for a power of this kind cannot be given except in pursuance of a contract. And generally where the owner intends to pass the porperty as well as to transfer the possession, the transferee obtains a title. For this reason the question is often solved by determining whether or not the owner intended to pass the property[9].

Title not avoided at the time of sale.

A person may elect to avoid or affirm a contract at any time after he knows about its being voidable and until, either expressly or by implication, he affirms the contract. So long as he does not affirm it he may keep the matter open, subject to any intervening rights of third persons. Where the contract was induced by fraud

1 Pease v. Gloahec, The "Marie Joseph" L. R. 1 P. C. 219; Tilley v. Bowman, (1910) 1 K. B. 745.
2 Pease v. Gloahec, supra.
3 Nandlal v. Bank of Bombay, 12 Bom. L. R. 316.
4 Babcock v. Lawson, 5 Q. B. D. 284, the case of a pawnee to which the common Law rule was extended.
5 Morrison v. Robertson (1907), 10 F. (Ct. of Sess.) 382; R. v. Middleton (1873), L. R. 2 C. C. R. 38.
6 Kingsford v. Merry (1856), 1 H. & N. 503; Hardman v. Booth supra; Cundy v. Lindsay, supra.
7 R. v. Russett, (1892) 2 Q. B. 312.
8 Lake v. Simmons, supra.
9 See Chalmers, Sale of Goods Act, 11th Edn. pp. 81 to 83.

which was discovered after action commenced but before any election to treat the contract as subsisting and before any *bona fide* purchaser acquired title, it was held that the party induced was entitled to rescind the contract.[1]

He may avoid the contract even after notice of an act of Bankruptcy committed by the other party, and whether before or after receiving order inasmuch as the trustee takes only the voidable title.[2] After avoidance the person, who has acquired such voidable title, cannot bring detinue against the seller, but the seller must return the purchase money paid, or set it off against the redemption moneys, where the goods have been pledged.[3]

The seller may be his pleading elect to avoid the contract, and is not bound to do any act *in pais*[4]. The avoidance takes place when the election is made and communicated to the other party.[5] Right to avoidance of the contract may be waived by the party entitled to it either by express affirmation,[6] or impliedly by proceeding with the contract as a binding contract after full knowledge of the circumstances entitling him to disaffirm.[7] So where the seller from whom goods were obtained by false pretences amounting to the offence of cheating has sued and obtained a decree against the vendee for the price of the goods he cannot afterwards elect to avoid the conract which was voidable only, and follow the goods into the hands of third parties.[8] In *Fazal* v. *Mangaldas*[9] a distinction is drawn between contracts obtained by fraud, and performance obtained by fraud, the contract being valid.

Onus of proof.

The *onus* is on the party seeking to avoid the contract to show that the buyer *did not* purchase in good faith and without notice[10]. In case of sale by mercantile agents the onus of proving good faith, etc. is on the person purchasing from the mercantile agent[11].

For definitions of "good faith" and 'notice" see the notes under section 27, *ante*.

Seller or buyer in possession after sale

30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous

1 Clough v. L. & N. W. Rly. Co. Ltd., (1871) L. R. 7 Ex. 26, 36.

2 Re Eastgate Exp. Ward (1905) 1 K. B. 465; Tilley v. Bowman, (1910) 1 K. B. 745.

3 Tilley v. Bowman, supra.

4 Halsbury, Vol. XXIX.

5 Scarf v. Jardine, (1882) 7 A. C. 345, 361; Clough v. L. & N. W. Rly. Co. Ltd., supra.

6 Ibid; Morrison v. Universal Marine Ins. Co., L. R. 5 Exch. 197;

7 Pease v. Lowden, 99 U. S. 578; Mohney v. Reed, 40 Mo. App. 99.

8 Tholesiram v. Duraji, 15 Mad. L.J. 375.

9 (1922) 46 Bom. 489; See also Jamsetji v. Heijibhai, (1912) 37 Bom. 158.

10 Whitehorn Brothers v. Davison, (1911) 1 K. B. 463.

11 Heap v. Motorists' Advisory Agency (1923) 1 K. B. at p. 589.

sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

Seller or buyer in possession after sale—Analogous law.

This section is based on section 25 of the English Act, (See Appendix) which in its turn was based to a large extent on sections 8 and 9 of the English Factors Act, 1889 There was no corresponding provision in Chapter VII of the Indian Contract Act.

Fraudulent disposition of goods by a seller who remained in possession of the goods sold was not provided for in the earlier English Factors Acts of 1823, 1825 and 1842, those being applicable only to "agents entrusted" with goods, a term which did not include the seller. In *Johnson* v. *Credit-Lyonnais*[1] the buyer had left the documents of title to goods in the seller's hands. and the latter had fraudulently pledged the goods to an innocent pledgee. The court held that the buyer was entitled to recover the goods from the pledgee. Section 3 of the English Factors Act, 1877, therefore, provided that the seller in possession of documents of title could make a valid sale, pledge or other disposition of goods to a buyer who had no notice of the former sale. That Act, however, applied only to "documents of title." Section 1 of the English Factors Act, 1889, extended the rule laid down in section 3 of the Factors Act of 1877 to *goods*.

Similarly, section 4 of the English Factors Act, 1877, for the first time provided that the buyer in possession of documents of title could make a valid disposition of goods so as to defeat the unpaid seller's rights. Section 9 of the English Factors Act, 1889, extended this rule by including the case of possession by the buyer not only of documents of title but also of goods.

It is to be noticed that section 27 (proviso) deals with cases where a mercantile agent is in possession with the consent of the owner ; there need not be any contract or sale to the agent. Mere possession with consent confers a right on such agent to transfer a good title provided he does it in the usual course of business. Here the person transferring has no title but he occupies a position which confers the right on him. Under section 29 a person obtaining possession under a voidable contract can transfer a good title to a

1 (1877) 3 C. P. D. 32 C. A. ; 47 L. J. C. P. 241.

bona fide purchaser, provided the contract has not been avoided at the time of sale. Here the title of the person selling is voidable and such title is considered good until the contract is avoided. Under section 30(1) the seller has no title at the time of sale, etc., but has possession, and in as much as he had title before he is considered or reputed to have it until contrary is known. Under S. 30(2) the person selling, etc., has either bought or agreed to buy and is in possession and as such is *prima facie* competent to transfer a good title.

The section is silent about passing of property to the buyer. If the property has passed to the buyer he can always confer a good title to a *bona fide* buyer or pledgee from him independently of the section.

Commenting on sub-section (2) of this section it has been observed in *Maung Aye Maung* v. *A. Scott & Co. and others*[1] that the general principle of law is that only the owner can give a good title to another of his own property and the law has always done its best to protect the rights of the legal owners. The commercial world, however, is more interested in removing restrictions upon trade and it is quite clear that business would be impossible if every time a purchaser wished to buy goods, he had to examine the title of his vendor. So the power given by section 30 (2), Sale of Goods Act, is in a sense a compromise which enables in certain circumstances a person, who is not a legal owner to transfer the title.

Sub-section (1)—disposition by seller in possession after sale.

When the seller retains title to the goods even after a contract of sale, he can always sell them again and confer a good title on the buyer. When the title is transferred he cannot resell except under S. 54 (2) which specifically gives him the power to resell under certain circumstances. Under S. 30 (1) if the seller having sold the goods retains possession of the goods or of documents of title to goods and sells or pledges the same himself or through a mercantile agent to a person who buys in good faith and without notice of the previous sale, such a sale has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

For the application of this sub-section it is essential that the seller should be in possession after sale and there should be delivery or transfer of the goods or documents of title by the seller or by a mercantile agent acting for him. When the property has not passed, the buyer seems to have only a *jus in personam* against the seller and no *jus in rem*[2], and if he is in default the case is covered by section 54 of the Act. In *Nicholson* v. *Harper*[3] the plaintiff had purchased wine stored in a warehouseman's cellars, and the seller afterwards pledged the wine to the warehouseman to secure advances made by him in good faith and without notice of the sale, and, on the seller becoming bankrupt his trustee put up the wine for sale. *Held*

1 A. I. R. 1940 Rangoon, 1, p. 2.
2 See notes under S. 22.
3 (1895) 2 Ch. 415 ; 73 L. J. 19 ; 64 L. Ch. 672.

that the plaintiff was entitled to the wine, as there had been no delivery of the goods to the pledgee after the sale, but they had continuously remained in his possession, and as there was no transfer to him of any document of title, and this sub-section did not apply, one or other of these things being necessary under sub-section (1). Where the seller after sale continued in possession and sold them to a decree holder of the seller, it was held that the decree holder acquired a good title[1]. In *Kitto* v. *Billie*[2] it was held that execution of a deed of assignment does not amount to delivery.

It would appear that the possession must be by the seller *qua* seller, and not in any other capacity, as, for instance, that of a hirer. Thus where the sale having been completed by delivery the goods are bailed or leased back to the seller, this sub-section will not apply[3]. In *City Fur Manufacturing Co* v. *Fureenbond, Ltd*[4]. H purchased a large quantity of fur at an auction and asked the auctioneer L who was acting also as broker to pay for and retain the goods. Subsequently H agreed to sell the fur to the plaintiffs, obtained money therefor, but without paying the sum due to L went to the defendants and agreeing to pledge the fur borrowed £ 178 0 sh. 6d the amount due to L and gave a delivery order addressed to L. When L was paid, the defendants obtained possession of the goods as a pledge for the advance made by them. Plaintiff sued to recover the goods, and the court held that L's possession was on behalf of H and H's pledge to defendants was valid as H was a seller in possession after sale, and such possession need not be actual or personal possession and may be possession by an agent, warehouseman or mercantile agent.

In *Cahn* v. *Pockett's Bristol Channel Co.*[5] a seller of goods sent to the buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, but the buyer never accepted the draft and retained the bill of lading, which he endorsed to a sub-purchaser, who received it in good faith for valuable consideration and without notice of any right of the original seller in respect of the goods. *Held*, the buyer having become insolvent, that he was in possession of the bill of lading with the consent of the seller so that its transfer to the sub-purchaser gave the latter a good title to the goods and that the original seller had no right to stop the goods *in transitu*.

Apparently, the word "delivery" refers to "goods" and the word "transfer" to "documents of title." It is not the contract that is validated under the section, but the delivery or transfer under the contract.

Sub-section (2)—disposition by buyer in possession after sale.

Sub-section (2) relates to a case where a buyer having bought or agreed to buy, for instance on credit, obtains, with the consent

1 Framjee v. Mc Gregor, 27 P. R. 1902. See also Haji Rahimbux v. Central Bank of India, (1928) 56 Cal. 367.

2 (1895) 72 L. T. 266.

3 Mitchell v. Jones (1905) 24 N. Z. L. R. 932.

4 (1937) 1 A. E. R. 799.

5 (1899) 1 Q. B. 643; 68 L. J. Q. B. 515.

of the seller, possession of the goods or the documents of title to the goods and sells or pledges them to a *bona fide* purchaser or pledgee. The seller having parted with the possession of the goods puts the buyer in a position to deal with them as his own, and whatever claim he may have against the buyer is not available against a *bona fide* transferee. The delivery or transfer by such a buyer or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods is to have effect as if such lien or right did not exist.

If the possession of the property is obtained by the buyer with the consent of the seller, it is immaterial that the consent was subsequently withdrawn[1], provided, of course, that the sub-buyer had no notice of the withdrawal of the consent. It would also seem that the consent need not necessarily be free consent. Cases of that kind, so far at any rate as documents of title are concerned, appear to be dealt with by section 53. Even if the possession be obtained by fraud, provided it does not amount to larceny by a trick, the case seems to fall under this sub-section[2].

Where the buyer obtains the documents in his own right, this sub-section does not seem to apply. Thus, if the seller under a f.o.b. contract on shipping the goods, takes the mate's receipt in his own name, thereby reserving the power to obtain a bill of lading to his own order, and the buyer afterwards demands and obtains the bill of lading from the master, he does not obtain it with the consent of the seller[3].

This section is clearly applicable only to persons who have either bought the goods or have agreed to buy the goods.

Buyer in possession

There may arise three sorts of cases to which this sub-section would be applicable. First, where the buyer obtains possession of the goods before the property has passed to him. An instance of that is when the seller by the contract reserves some special interest in the goods[4]. Another case may be where the goods are intended to subject to the seller's lien, and he delivers them to the buyer for some purely temporary purpose on the undertaking of the buyer to redeliver them to the seller to keep in his possession until the price is paid[5].

The second case is where the buyer has obtained possession of the documents of title before the property in the goods has passed to him. In *Cahn* v. *Pockett's Bristol Steam Packet Co.* cited above, the property in the goods never passed to the buyer by reason of the provisions of section 25 (3), but the buyer had obtained possession of the bill of lading with the consent of the sellers for, although it was the buyer's duty to return the bill of lading as he did not accept the bill of exchange annexed to it, it was sent to him by the sellers

1 Cahn v. Pockett's Bristol Channel Steam Packet Co., supra.
2 See notes under section 27.
3. See Craven v. Ryder (1815) 6 Taunt. 433, 16 R. R. 644, and cf. Inglis v. Robertson (1898) A. C. 616.
4 See Dodsley v. Varley (1840) 12 A. & E. 632, 54 R. R. 652.
5 See Tempest v. Fitzgerald (1820) 3 B. & Ald. 680, 22 R. R. 526.

quite voluntarily. It was, therefore, held that the plaintiffs obtained a good title to the goods as against the original sellers, for, "from the point of view of the *bona fide* purchaser, the ostensible authority based on the fact of possession is the same, whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not[1]."

The third case is where the buyer obtains the documents of title after the property in the goods has passed to him, but the goods are still subject to the seller's lien or right of stoppage in transit, or subject perhaps to some special interest reserved by the contract. Cases of this class would ordinarily fall under section 53 of the Act, with the difference that this sub-section provides for cases where the documents are improperly obtained, and protects the second purchaser who takes them in good faith and without notice of the original seller's right, while section 53 assumes that the documents are properly obtained.

Agreement to buy

It is necessary that there should be binding agreement to buy and not a mere option to buy. But the agreement may be conditional[2]. In this case the plaintiff entered into agreement with T to sell him 'a plot of land for £ 385, subject to purchasers' solicitors' approval of title and restrictions" and in consideration of the above transaction the plaintiff agreed to sell to T a motor car for £ 300. both sales to be carried out simultaneously. T subsequently got possession of the car "on loan" from plaintiff, and without paying for it sold it to the defendant who was a *bona fide* purchaser. Thereafter T's solicitor disapproved of the restrictive condition in connection with the land Plaintiff sued to recover the car from the defendant. It was held that T had agreed to buy the car under a conditional contract and so under a contract of sale within the meaning of the Act, and had no mere option to buy

When goods are sold 'on approval' or 'on sale or return' the buyer has an option to buy, and so long as the option lasts there is no agreement to buy. But there is a sale when the option is exercised or is deemed to be exercised, *e. g.* by signification of acceptance or by doing an act adopting the transaction or when no time is fixed, after the expiration of a reasonable time (vide S.24). In such cases after the exercise of option the property in the goods is transferred to the buyer and he can always transfer a good title to a *bona fide* transferee irrespective of section 30 (2)[3].

Hire purchase agreements.

A hirer under a hire purchase agreement who has merely an option to buy, and is not under a binding agreement to buy the goods, would not be a person who has "agreed to buy the goods" within the meaning of this section. In *Belsize Motor Supply Company* v. *Cox*[4] a motor car was delivered on hire for 24 months at a monthly

1 Per Collins, L. J (1899) 1 Q. B. at p. 658.

2 Marton v. Whale (1917) 2 K B. 480.

3 See notes under S 24. See also Kemp v. Bravingtons (1925) 41 T. L. R. 519; Bradley v. Ramsay & Co. (1912) 106 L. T. 771; Weiner v. Harris, (1910) 1 K. B. 285; Weiner v. Gill (1906) 2 K. B 674; Kirkham v. Attenborough (1857) 1 Q. B. 201; Truman v. Attenborough (1910) 26 T. L R. 601.

4 (1914) 1 K. B. 244.

payment of hire at £ 15-12-2, £ 50 was to be made in advance on specified dates. If the hirer should on or before the expiry of 24 months be desirous of purchasing the vehicle he could do so by making the amount of hire paid equal of £ 424-11-6. There were certain restrictions as to reselling, selling etc., and in case of breach it was made lawful for the owner to take possession of the vehicle and terminate the agreement. During the currency of the agreement there being a sum due and unpaid on account of hire, the hirer without the consent of the owner pledged the car to a pledgee who took it in good faith and without notice of the owner's rights. The owner on coming to know of this demanded the car from the pledgee who refused to return it At the date of the demand and refusal there was sum of £ 58-9-0 due and unpaid on account of hire. Held, that the effect of the agreement was that, having paid 24 instalments the hirer had an option either to become purchaser of the car or to return it and claim back the £ 50/- paid in advance and that the agreement did not impose any obligation on the hirer to purchase and so he was not a person who had "agreed to buy" within the meaning of section 25 of the English Act. It was also held in that case that the pledgee had an interest in the car, and that therefore the measure of damages was not the full value of the car but was only the value of the owner's interest therein, *i. e.*, the amount of hire and purchase money remaining unpaid.

In *Helby* v. *Matthews*[1] the hirer of a piano agreed to pay rent by monthly instalments. on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire if the hirer punctually paid all the monthly instalments, the piano should become his sole and absolute property and that until full payment the piano should continue the sole property of the owner. Tho hirer received the piano, paid a few of the instalments, and pledged it with a pawnbroker as security for an advance. Held, that upon a true construction of the agreement the hirer was under no obligation to buy, but had an option either to return the piano or to become its owner by payment in full So he had not "agreed to buy" within the meaning of the section and the owner was entitled to recover the goods from the pawn broker.

On the other hand, in *Lee* v. *Butler*[2] the hirer of furniture agreed to pay rent in two instalments and upon such payment the furniture etc. would become the absolute property of the hirer. The agreement also provided that no property or interest in the said furniture, goods etc. other than as tenant should rest in the hirer until the whole of the rent had been actually paid as provided. The hirer before the last payment had accrued due or been paid, sold and delivered the furniture to the defendant who received them *bona fide* etc. *Held*, that the hirer had agreed to buy and so the purchaser from him got a good title. "Here there was an agreement to buy. The purchase money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them. which might have been enforced by action. The person who obtained the goods could not insist upon

1 (1895) A. C. 471. 2 (1893) 2 Q. B. 318.

returning them and so absolve himself from any obligation to make further payment"[1].

In *Whiteley* v. *Hill*,[2] the hire purchase agreement was held to be assignable, but the assignee could only retain possession of the chattel upon the terms of the contract. There the hirer of a piano had an option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last instalment was paid, the hirer having the right at any time to terminate the agreement by returning the piano. The hirer paid several instalments and then sold the piano to the defendant. In an action of detinue and conversion the defendant paid into court the amount of the remaining unpaid instalments Held, that the defendant acquired the right of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, and that the measure of damage was the amount of the unpaid instalments, and that the plaintiff was not entitled to recover the piano or its full value, but only the amount paid into court. The sale by the hirer was held, under the circumstances, not to amount to a repudiation of the contract of hiring.

Whether the contract between the parties amounts to an agreement to buy or only an option to purchase depends on the construction of the contract, and not on the term as used by the parties. The test to be applied in ascertaining the nature of the transaction is whether the agreement imposes an obligation on the hirer to buy though the consideration is payable by instalments (in which case it will be an agreement to buy) or whether the hirer is not bound to pay the full amount of the purchase money or can terminate the hiring at any time by delivering the chattel to the other party (in which case it will be an agreement to hire). The fact that the property is not to pass until the whole amount is paid or that the owner has the option of putting an end to the agreement and recover possession of the chattel does not conclusively determine the nature of the transaction. In *Lewis* v. *Thomas*[3] the hirer had the option of terminating the hiring at his own costs after not less than one-half or the total amount of the instalments had been paid. Held, there was no agreement to buy, as the hirer had reserved to himself the right to determine the contract and so the case came within the principle of *Helby* v. *Matthews* supra

In determining whether property has passed to the hirer it is important to consider in the first place whether there is an agreement to hire (in which case the property would not pass) or an agreement to buy. If there is an agreement to buy then the next question is what is the intention of the parties as to the passing of property which is to be ascertained from a consideration of the whole contract. When goods are delivered under an agreement to buy it is presumed that the intention is that property should pass. But this presumption could be rebutted by evidence of a contrary intention to be adduced

1 Per Lord Herschell in Helby v. Matthews, supra at p. 478.

2 (1918) 2 K. B. 808.

3 (1919) 1 K. B. 819; Ser Grande Maison D' Automobile v. Beresford (1909) 25 T. L. R. 522; hirer with an option to purchase; Mc Kenzie & Co. v. Muhammad (1929) 4 Lah. 510; Edwards v. Vaughan (1910) 26 T. L. R. 545.

from the agreement itself taken as a whole. In *McEntire* v. *Crossley*[1] there was an agreement for letting out a gas engine at a rent to be paid by instalments amounting in all to £ 240/-with an option to the lessee to purchase the engine upon payment in full. Until payment in full the engine was to remain the sole and absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments or if the lessee should become bankrupt the lessors might elect to recover the full balance remaining due or instead to resume possession of the engine and sell it. The lessee after paying the first instalment became bankrupt. It was held that under the construction of the agreement the property never passed to the lessee but remained in the lessors In *Cole* v. *Nanalal*[2] there was an agreement to sell on a hire purchase system nine lorries which provided that the lorries were not to be considered as sold until the final payment had been received, the consideration being payable by certain instalments. It was held that the property passed. In *Bhimji* v. *Bombay Trust Corporation*[3] property was held to pass under the old S. 78 of the Contract Act though the agreement provided "pending the currency of the agreement the plaintiff was to hold the car as bailee of the defendant company, and was not to have any property or interest as purchaser in it until he exercised his option of purchasing."

A hirer under a hire-purchase agreement is competent to assign his interest, in the absence of a contract to the contrary.[4] Where a hirer has pledged or sold the article before the termination of the contract of hiring, the court may, in its discretion, direct the purchaser or pledgee to pay the owner the amount of hire unpaid, instead of returning the chattel[5].

Where the hirer is under the contract bound to keep the chattel in repair, he has implied authority to employ a repairer who will ordinarily have a lien for repairs on the article as against the owner,[6] except in cases where he has had notice of the hirer's want of authority[7]. A hire-purchase agreement does not become a sale until the conditions of the agreement are fulfilled[8].

In *Martin* v. *Whale*[9] where B agreed to buy a car if his solicitor approved and having obtained possession of the car, sold the same to C but the solicitor subsequently disapproved of the transaction it was held that the title had passed to C the buyer.

Attachment and sale in execution of decree—auction purchaser.

In *Maung Aye Maung* v. *A. Scott & Co. & others*,[10] the question of law referred to a Full Bench was in the following terms :

1 (1895) A. C. 457. Ex parte Rawlings (1888) 22 Q. B. D. 193 ; property did not pass until all the instalments were paid.
2 (1924) 26 Bom. L. R. 880. case-law discussed. See Maung Booh v. Motor House Co. (1929) 7 Rang. 481, sale with a penalty clause.
3 (1930) 32 Bom. L. R. 64, 79
4 Whiteley v. Hill (1918) 2 K. B. 808.
5 In re wait (1927) 1 Ch. 606, C. A.
6 Green v. All Motors Ltd. (1917) 1 K. B. 625 ; Keene v. Thomas (1905) 1 K. B. 136.
7 Albermale Supply Co. v. Hind & Co. (1928) 1 K. B. 307.
8 Gopal v. Sorabji (1904) 6 Bom. L. R. 871.
9 (1917) 2 K. B. 480.
10 A. I. R. 1940 Rangoon 1, p. 2.

If a decree-holder attaches and sells in execution of a decree against a judgment debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) movable property and such property is subsequently recovered by its true owner from the auctionpurchaser, is the auction-purchaser entitled to recover from the decreeholder the money which he has paid on the ground that there has been a total failure of consideration ?

The facts of the case were as follows:—

The first defendants, Messrs. A. Scott & Co., delivered to Saw Yu Hoe. defendant (2). an engine upon a hire-purchase agreement ; by the terms of the agreement the engine was to remain the property of the vendors until the purchase price was paid in full: One W. Kin Mun obtained a money-decree against Saw Yu Hoe and purported in execution thereof to attach this engine which was in the judgment-debtor's possession but was the property of the first defendants Messrs. Scott & Co. It was then ostensibly put up for sale and purchased by the appellant Maung Aye Maung, When the appellant discovered that the engine which he thought he had bought and for which he had paid the purchase price belonged to Messrs. A. Scott & Co. and that he was obliged to return it to them he sought to recover the purchase price from some one or other of the defendants.

Held, that the answer to the question raised in the reference must be given in the affirmative

Disposition by a mercantile agent acting for the seller or the buyer.

A disposition by a mercantile agent of the buyer or the seller who has possession of the goods stands on the same footing as a disposition by such buyer or seller himself and a person dealing with him in good faith and without notice of the other party's rights is as much protected as if he had dealt so with the principal himself. But this protection extends only to the cases where the agent dealt with is a mercantile agent as defined in section 2, clause 9, and does not extend to the case of any agent who does not answer that description.[1] Even a mercantile agent who obtains possession of the goods otherwise than such agent or dispose of the goods otherwise than while acting as agent for such seller or buyer cannot give a good title to a dealer with him even if he is a dealer in good faith and without notice of the nature of his possession.[2] The only fact that estops the real owner of the goods from claiming them from a subsequent disponee from a mercantile agent is that he voluntarily passes possession to him as such agent, for once he has made over possession to him as such he cannot question his authority which in the case of a mercantile agent is incidental to his profession as such and does not require any special conferment.

1 Cole. v. N. W. Bank, L. R. 10 C. P. 354 (372-373).   2 Ibid.

CHAPTER IV.

PERFORMANCE OF THE CONTRACT

Duties of seller and buyer

***31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.**

Delivery and acceptance—duties of seller and buyer.

As observed in *Buddle* v. *Green*[1], "in every contract of sale there is involved a contract on the one side to accept and on the other to deliver." Although a bargain and sale may be so far incomplete as not to operate as an immediate transfer of property, yet the engagements which naturally result from the contract are in existence as soon as it has been entered into. There is an implied promise or undertaking on the part of the vendor to put the vendee into possession of the thing sold without delay, if the contract makes no mention of the time of delivery, and an undertaking by the vendee to accept the goods and pay the price on the delivery of the subject-matter of the sale by the vendor. There is also an implied undertaking, on the part of the vendor of a specific chattel, to be delivered at a future day, that he will not do anything inconsistent with the rights of the purchaser; and, if he wastes or resells the property, he is responsible in damages[2].

A contract of sale always involves reciprocal promises, the seller promising to deliver the goods sold and the buyer to accept and pay for them[3]. In the absence of a contract to the contrary they are to be performed simultaneously and each party should be ready and willing to perform his promise before he can call upon the other to perform his.[4]

The seller owes to the buyer as onerous a duty to deliver the goods, as the buyer owes to the seller the duty to accept and pay for them according as it is agreed between the parties[5]. "Whichever party," says Lord Halsbury, "was the actor. and is complaining of a breach of contract, is bound to show as a matter of law that he has performed all that was incidental to his part of the concurrent obligations."[6] "If," says Martin B, "one buys goods of another in the possession of a third party, the vendor undertakes that they shall be delivered in a reasonable time. If I buy a horse of you in another

*Analogous law.

Section 27 of the English Sale of Goods Act, 1893, which is the same as section 31 of the Indian Act.

(1857) 27 L. J. Ex. 33 ; 114 R. R. 991.

Chinery v. Viall, 5 H. & N. 288 ; 29 L. J. Ex. 180 ; Bowdell v. Parsons, 10 East, 359.

Per Wilson B in Buddle v. Green, 27 L. J. Ex. 33.

Forresstt v. Aramayo (1900) 9 Asp. Mar. Cas, 134 C. A.

Woolfe v. Horne, (1877) 2 Q. B. D. 355; Wood v. Baxter, (1883) 49 L. T. (N.S.) 45.

Forresstt v. Aramayo, supra.

man's field, it is a part of the contract that if I go for the horse I shall have it.[1]"

The contract of sale may modify the terms. In a sale on credit, the title and the right to immediate possession are transferred[2] though payment is postponed. Where the buyer has put an end to the agreement and has repudiated his obligation, the seller is under no duty to deliver[3]. Where the seller does not give facilities to the purchaser in taking delivery, he cannot maintain an action for the price of goods sold[4].

The section must be read subject to the provisions of Chapter V, *post* and sections 7 and 8, *ante*.

In accordance with the terms of the contract of sale.

The duties of either party are regulated by the terms of the contract. Thus the general obligation to deliver may be modified by the terms of the contract. As Lord Blackburn says, there is no rule of law to prevent the parties from making whatever bargain they please[5], or to waive their rights of enforcing or demanding reciprocal performance against or from the other[6]. Thus, where the seller gives the buyer a delivery order for the goods it may be a condition that the order should be given up to the warehouseman before the buyer can get the goods[7].

As sale is a consensual contract, the parties may by agreement make the price payable how, when and where they please; and when the time of payment arrives, the parties may agree that the debt shall be discharged by any means which amount to an accord and satisfaction[8]. Delivery, acceptance and payment all must conform to the terms of the contract of sale.

*32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Payment and delivery are concurrent conditions

Payment and delivery concurrent conditions.

If A and X agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on this concurrence of readiness and willingness to perform, the conditions are *concurrent*.

1 Buddle v. Green, supra.
2 Bloxam v. Sanders, (1825) 107 E. R. 1809; 28 R. R. 519; Staunton v. Wood, (1851) 117 E. R. 1025; 88 R. R. 641.
3 Chunnamal v. Moolchand, A. I. R. 1928 P. C. 99=9 Lah. 510.
4 Smith v. Chance, (1819) 106 E. R. 540; 21 R. R. 495.
5 Calcutta Co. v. De Mattos (1863), 32 L. J. Q. B. 214, at p. 328.
6 Sooltan v. Schiller, 4 Cal. 252.
7 Bartlett v. Holmes (1853), 13 C B. 658.
8 Chalmers, Sale of Goods Act, 1893, 11th Edn. p. 89.

* **Analogous law.**

Section 18 of the English Sale of Goods Act, 1893, which is the same as section 32 of the Indian Act.

'Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale.[1]" The present section is based on this well-established rule.[2]

The general principle laid down in section 51 of the Indian Contract Act, 1872, is that 'when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise'. A contract of sale is an example of a contract consisting of reciprocal promises to be simultaneously performed, and therefore the seller is not bound to deliver, if the buyer is not ready and willing to pay the price on delivery[3]: and conversely, the buyer is not bound to pay the price, and is not liable to an action for failure to accept the goods, if the seller was not ready and willing to let the buyer have the goods on demand[4].

Readiness and willingness—evidence.

The general rule laid down in this section thus is that the obligation of the seller to deliver and that of the buyer to pay are implied concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or offer to perform, or averring readiness and willingnes to perform his own promise. And the words "ready and willing" imply, not only the disposition, but the capacity to do the act[5].

Under the English law it seems that in an action for nondelivery, the buyer need not give evidence that he was ready and willing to pay, till the seller shows he was ready to deliver[6]. "The averment of the plaintiff's readiness and willingness to perform his part of the contract will be proved by showing that he called on the defendant to accomplish his part." Conversely, in an action for non-acceptance, the seller need not prove any tender of delivery. It is enough to show that he was ready and willing to deliver[7]. The Indian Courts, however, in dealing with cases under section 51 of the Indian Contract Act have always insisted upon the plaintiff to go further and give some affirmative evidence that he was ready and willing to perform his part of the contract before he could succeed[8]. The

1 Notes to Pordage v. Cole, 1 Wms. Saunders (ed. 1871), p. 556.

2 See Cheugravelu v. Venkanna, A. I. R. 1925 Mad. 971=86 I. C. 299.

3 Morton v. Lamb (1797) 7 T. R. 125, 4 R. R. 395.

4 Dixon v. Fletcher (1837) 3 M. & W. 146, 49 R. R. 543.

5 Per Lord Abinger, C. B., in De Medina v Norman (1842), 9 M & W. 820, at 827; 11 L. J. Ex. 370; 60 R. R. 912; Lawrence v. Knowles, (1839) 5 Bing. N. C. 399; Measures v. Measures, (1910) 2 Ch. 248; 79 L. J. h. 707 (C. A.).

6 Wilks v. Atkinson (1815), 1 Marshall, 412; see also Squier v. Hunt (1836) 3 Price 68, Levy v. Lord Herbert (1817) 7 Taunt. 314, 318

7 Jackson v. Allaway (1844), 6 M. & Gr. 942; Baker v. Firminger (1859), 28 L. J. Ex 130: Lovey v. Goldberg (1922), 1 K. B 688, at p. 692 (non-delivery)

8 Ganesh Das Ishar Das v. Ram Nath, A. I. R. 1928 Lah 20=9 Lah. 148=111 I. C. 498; Chengravelu Chetty & Sons v. Akarapu Venkanna & Sons, A. I. R. 1925 Mad. 971=86 I. C. 299.

Indian Sale of Goods Act being in substance a part of the Indian Contract Act, the same rule as under section 51 of the latter Act seems to be implied under section 32 of the former Act.

The seller need not have the goods in his actual custody or possession. It is sufficient if he has such control of them that he can cause them to be delivered[1]; and similarly the buyer is ready and willing to pay if he has made proper arrangements for making payment[2]. If follows from this that actual tender of delivery[3], or of the money[4], is unnecessary to enable the seller to maintain an action for the price or failure to accept, or the buyer to maintain an action for failure to deliver.

If the buyer is insolvent, or states that he will not accept delivery, this is a strong evidence that he is not ready and willing to pay[5]. Likewise, a wrongful refusal by one party to be bound by the contract discharges the other from the performance of condition which he would otherwise have to fulfil, and the latter is thereupon exonerated from the necessity of proving his readiness and willingness to perform them[6].

In *Mulchaud Chandalia* v. *Kundanmull*[7] in a contract of sale of ready goods, it was held that it is enough if between the contract date and the date of delivery, the seller is in a position to deliver. In *Satyanarayanmurti* v. *Crikalappa*[8] it was decided that in case of repudiation by the buyer, the seller's suit for damages could not be defeated by proof of inability to implement the contract after such repudiation.

The phrase "the seller must be ready and willing to pay the price in exchange for the possession of the goods" does not necessarily mean exchange then and there, but exchange in a business sense[9] So where price is payable in exchange for shifting documents, either expressly or by implication under this section, the seller performs his contract by tendering the documents although the goods may be incapable of inspection and acceptance, and the buyer must pay the price without waiting for their arrival.[10]

Unless otherwise agreed.

The rule laid down in this section is only a general one and all agreements to the contrary override it. Thus, the buyer may

1 Kanwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan, A. I. R 1926 Lah. 318=7 Lah. 442=94 I. C. 304 ; Nalam Lacksmikantham v Narayanswami Iyer, A. I. R. 1926 Mad. 1109=97 I. C. 986.

2 Kidar Nath-Behari Lal v. Shimbhu Nath-Nandu Mal, A. I R. 1927 Lah. 176=8 Lah. 198=99 I. C. 812.

3 Jackson v. Allaway (1844) 6 Man. & G. 942 ; Boyd v. Lett (1845) 1 C. B. 222 ; Levey v. Goldberg (1922) 1 K. B. 688, 692.

4 Rawson v. Johnson (1801) 1 East. 203, 6 R. R. 252 ; Shriram Rupram v. Madangopal Gowardhan (1903) 30 Cal. 865 ; Peare Lal Kishan Prasad v. Diwan Singh-Ganeshi Lal, A. I. R. 1930 All. 661=125 I. C. 453 : Cf. Pickford v. Grand Junction Railway (1841) 8 M. & W. 372, 378, 58 R. R. 742 ; see also Zippel v. Kapur, A. I. R. 1932 Sind 9=139 I. C. 114.

5 Lawrence v. Knowles (1839) 5 Bing. N. C. 399, 50 R. R. 721 ; Chunna Mal-Ram Nath v. Mool Chand, A. I. R. 1928 P C. 99=9 Lah. 510.

6 See Dayabhai Dipchand v. Maniklal Vrijbhukan (1871) 8 B. H. C. A. C. 123.

7 (1919) 47 Cal. 458=57 I. C. 189.

8 A. I. R. 1926 Mad. 410.

9 Ryan v Ridley & Co, (1902) 8 Com. Cas. 105.

10 E. Clemens Horst Co v. Biddell Bros., (1912) A. C. 18.

agree to pay the price on a fixed date, which may arrive before the time of delivery. In such a case the delivery is not a condition precedent to payment.[1] On the other hand, the seller may agree to deliver, irrespective of payment, as when he sells on credit, in which case payment is not a condition precedent to delivery[2]. In C. I. F. contracts generally, the price is payable in exchange for the shipping documents[3], though this exception perhaps is more apparent than real[4]. When goods are sold on credit, and nothing is agreed upon as to time of delivering the goods, the buyer is immediately entitled to the possession, and the right of property at once vests in him[5]. But if he has not obtained possession within the period of credit the seller may refuse to deliver until the price is paid[6]. In *Field* v. *Lelean*[7] spares were sold under a written contract which provided "payment half in two, and half in four months". Held, evidence was admissible of a trade usage that delivery could not be given until payment as to which the contract was silent. In *Lockett* v. *Nicklin*[8] goods were ordered by letter which did not mention any time of payment, but the order did not contain the whole contract. Held, evidence was admissible to show that the goods were supplied on credit. Where no time is fixed for the delivery or payment the correct construction of the law is that the delivery is to take place on payment of the price, and that the buyer will pay the price on receipt of the goods[9]. The words "cash or delivery" mean cash in exchange for, and simultaneously with, the delivery of the things promised[10].

Although section 32 may be excluded by the contrary agreement that the buyer should be entitled to credit, yet, if the buyer becomes insolvent, the provision for credit is excluded by law[11].

Concurrent conditions.

A concurrent condition may itself depend on a condition precedent. Thus, where goods are to be delivered as directed or required by the buyer, he must give directions, after which the seller must be ready and willing to deliver[12]. Where goods are deliverable by instalments, the same concurrent conditions as to delivery and payment *prima facie* exist with regard to each instalment[13]. Where there is an entire contract for the sale of a quantity of goods, a complete delivery by the seller is a condition precedent to the buyer's obligation to accept and pay for any of them, even though the goods are deliverable by instalments[14].

1 Smith v. Woodhouse (1806) 2 Bos. & P. (N. R.) 233.
2 Staunton v. Wood (1851) 16 Q. B 638; 83 R. R. 641.
3 E. Clemens Horst & Co. v. Biddell Brothers (1912) A. C. 18.
4 See notes in Appendix on "C. I. F. Contracts."
5 Bloxam v. Sanders (1825) 4 B. & C. 941, 948.
6 See Dicker v. Jackson (1848) 6 C B. 103.
7 (1861) 30 L. J. Ex. 168.
8 (1848) 2 Ex. Ch. 93.
9 Joggernath v. Beck, 2 N. W. P. 60: Carlisles v. Ricknauth, 8 Cal. 809
10 Hoilgers & Co. v. Jadub Lal Shaw, 16 Cal. 417 (422).
11 Ex parte Chalmers (1873) 8 Ch. App. 289; Ex parte Carnforth Haematite Iron Co. (1876) 4 Ch. D. 108, C. A.
12 Great Northern Rail Co. v. Harrison (1852) 12 C. B. 576, 600 Exch.; 92 R. R. 786, 801.
13 Brandt v. Lawrence (1876) 1 Q. B. D. 344, C. A.; See also Mersey Steel Co. v. Naylor, (1884) 9 App. Cas. 434, at p. 444. In the case of instalment contracts, section 32 must be construed subject to section 38 (2) post.
14 Oxendale v. Wetherall, (1829) 9 B. & C. 386; 33 R. R. 207.

Delivery at seller's option.

Where the delivery of the goods is under the contract to be at the seller's option there must be implied an additional term to the contract in respect of a delivery made during the currency of the option that the seller shall give to the buyer sufficient notice of his intention to make delivery and a reasonable time in which to arrange for funds with which to pay for the goods. But when the seller fails to exercise his option to deliver the goods before the last day, the contract plainly becomes a contract to sell and deliver the goods on the last day and the buyer must be ready and willing to take delivery of the goods and pay for them on that date. No notice to the buyer of intention to deliver on the last day is necessary[1].

See also notes under section 38 for full discussion on the subject.

33. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Delivery

Delivery—how made.

Possession of goods may be delivered in several ways according to the circumstances. Delivery may be made either to the person who is to acquire possession or to a person authorised on his behalf. And it may be made in either case either by an actual and apparent change in the custody of the goods, or by a change in the character of a continuing custody. In the case of objects, or an aggregate of objects, not capable of manual transfer by a single act, it has to be considered what acts are a sufficient transfer in fact. It has further to be considered when a transfer of custody in fact does or does not amount to delivery of possession in law[2].

This section reproduces section 90 of the Indian Contract Act, (Appendix) with the addition of the words "which the parties agree shall be treated as delivery." Paragraph 143 at p. 120 of Halsbury's Laws of England. Vol. XXIX, states the law on the subject as follows:

"Delivery of the goods may be made by the seller doing any act or thing whereby the goods are put into the custody or under the control of the buyer or his agent in that behalf, or whereby the buyer or his agent is enabled to obtain such custody or control.

"Delivery may also be made by means of any act or thing which the parties agree shall be treated as a delivery.

"Where the goods are at the time of the contract of sale in the possession of the buyer or his agent, the completion of the sale operates *prima facie*, as a delivery of the goods."

1 Jagannath Sagarmal v. J. J. Aaron & Co., A. I. R. 1940 Rang. 284.

2 See Pollock and Wright on Possession, p. 57.

'Delivery' is defined as meaning *voluntary* transfer of possession from one person to another[1]. It is essential that transfer of possession should be voluntary. Thus, although a theft of goods involves a transfer of possession from the possessor of the thief, it cannot be said that the goods were delivered to the thief, as the transfer of possession is made without the consent of the owner or possessor, and is, therefore, not a voluntary transfer[2].

Delivery, according to this section, may be made (a) by doing anythig which the parties agree shall be treated as delivery, or (2) which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Thus, parties may in time of war agree that the delivery of a despatch telegram may take the place of a bill of lading [3] Delivery to a carrier or wharfinger is generally regarded as delivery to the buyer[4].

Modes of delivery.

Ordinarily, delivery is of three kinds ;

(1) ACTUAL DELIVERY. - Actual or physical delivery of goods takes place where the goods are handed over by the seller to the buyer or his agent authorized to take possession of and hold them on his behalf. In *Galbraith* v. *Block*[5] it was held that where the delivery, which was agreed to be made at the buyer's premises, was made to a person who appeared to have authority to receive the goods, but had no authority in fact, there was a good delivery to the buyer.

In the case of actual delivery there is manual transfer of the commodity sold and the physical custody of the thing passes from the seller to the buyer. Thus, a watch, a book, or a gun sold may be actually transferred from the hand of the vendor to that of the purchaser or his agent, or if the commodity be bulky, it may be removed from the warehouse of the vendor to that of the purchaser, and placed under the control of the latter. In all such cases there is an actual delivery.

Symbolic delivery

(2) SYMBOLIC DELIVERY—But the goods may be incapable of manual delivery, such as a hay-stack in a meadow, and law will not insist upon manual transfer of the commodity in such a case. Delivery, therefore, may be constructive and it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. The effect should be to put the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

A most common instance of symbolic delivery is the delivery of the key to the purchaser of the godown in which the specific goods sold are locked up. It gives to the purchaser actual control of the place where the goods are and thereby of the goods them-

1. Section 2(2) ante : see pages 12 and 16 to 19. See also illustrations under old S. 90 of the Contract Act (Appendix).
2. See Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 16.
3. See Haji Peer Mohammad v. Sakarath, A. I. R. 1928 Mad. 103=48 M. L. J 199.
4. See section 39 of the Act.
5. (1922) 2 K. B. 155.

selves[1]. In *Gough* v. *Evrard*[2] where the key of a wharf was handed over, it was held to be a symbolical delivery, for the key carried with it the 'manual control' of the goods and the delivery of the key was held to be an "emphatic declaration of an intention to transfer control." But, in *Milgate* v. *Kebble*[3], where only the inner key of the warehouse was handed over, and the outer key was retained it was held that there was no symbolical delivery, as there was no access to the goods.

Bowen L. J. observed in *Sanders* v. *Maclean*[4]:

> "A cargo at sea while in the hands of a carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo... It is the key which in the hands of the rightful owner is intended to unlock the door of the warehouse floating or fixed in which the goods may chance to be."

It appears that merely telling a man that the key of a warehouse, etc., is at his disposal is at most a licence, and as regards property or possession has no effect at all until he acts on the authority.[5]

It may also be noted that the key is not the symbol of the goods but its delivery has the effect of transferring the possession of the goods in the circumstances explained above[6].

(3) CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT— Constructive delivery

There may be a change in the legal character of the goods without any change in the actual and visible custody, for instance, by attornment, that is, by formal acknowledgment by the person who is in actual physical possession of the goods that he holds the goods on behalf of and at the disposal of another. In such a case the delivery is said to be constructive. The delivery of documents of title is a well-known instance of constructive delivery.

Attornment may happen in one of three ways :

(a) Seller in possession.

A seller in possession of the thing sold may assent to hold it solely on the buyer's account, for instance as bailee. In *Elmore* v. *Stone*[7] there was a sale of a horse. The seller at the buyer's request agreed to keep it at livery, the buyer being liable for the charges for the keep of the horse and removed the horse from one part of his stable to another. It was held that there was a delivery. *Marvin* v. *Wallis*[8] also related to sale of a horse. The seller asked the buyer to lend him the horse for a week to which the buyer assented and

1 See Wrightson v. McArthur and Hutchisons, Ltd. (1921) 2 K. B. 807 ; Ward v. Turner (1751) 2 Ves. Sen. 431, 443.
2 (1863) 159 E. R. 1 ; 133 R. R. 558.
3 (1841), 133 E. R. 1073 ; 60 R. R. 475.
4 (1883) 11 Q. B. D. 327.
5 See Hilton v. Tucker (1888) 39 Ch. D. 669, 676.
6 Pollock and Wright on Possession, p. 61. (cf.) Wrightson v. McArthur (1921) 2 K. B. 807.
7 (1809) 1 Taunt. 458, 10 R. R. 578. But see Carter v. Toussaint (1822) 5 B. & A. 855 where however there were no charges for keeping the horse.
8 (1856) 6 E. & B. 726, 106 R. R. 784. See also Ancona v. Rogers (1876) 1 Ex. D. 285.

left the horse in the custody of the seller. It was held that there had been a delivery to the buyer.

The seller's assent must be proved; it will not be presumed[1]. But acts of the buyer treating himself as owner and the seller as his servant or bailee would be relevant to prove delivery as against the buyer. Thus, in *Castle* v. *Sworder*[2] the defendant gave a verbal order, *with six months' credit*, for some rum and brandy of the plaintiff. The plaintiff sent defendant an invoice specifying particular goods as sold to him "free for six months," *i.e.* to remain in plaintiff's warehouse without charge. credit also being given for six months. At the end of the six months defendant asked plaintiff if he would take the goods back or sell them on defendant's account. This was held to amount to assent by defendant to plaintiff holding those goods for him as warehouseman.

Similarly, where the goods are stored in the seller's warehouse, the seller after sale may agree to hold the goods on the buyer's behalf, and the character of the seller's possession may consequently change. Such an agreement should be clearly proved and cannot be presumed by the mere issue of a delivery order; there should be some positive act done under it to operate as a constructive delivery of the goods. In *Townley* v. *Crump*[3] "there was a total failure of proof that where a vendor who is himself the warehouseman sells to a party who becomes bankrupt before the goods are removed from the warehouse. the delivery order operates, by reason of this custom, to prevent as lien from attaching." In that case it appears that the sellers had not made any transfer in their books.

Does the fact that the buyer pays, or agrees to pay warehouse rent for goods left in the seller's warehouse of itself sufficient to show that the seller holds as his bailee? Lord Ellenborough seemed to have given a reply in the affirmative to this proposition in *Hurry* v *Mangles*[4]. But in later authorities[5] it has been held that it would be too wide to hold that if there is nothing but payment of warehouse rent, or agreement to pay, there is delivery. But if the buyer has actually rented part of the warehouse and the goods bought by him are transferred to that part, it appears to amount to delivery.

In *Whitehouse* v. *Frost*[6] the vendee who resold the goods gave to the sub-vendee an order on the vendor to deliver them to the sub-vendee, and the vendor accepted that order. Held, there was constructive delivery though the goods were not separated from the bulk.[7]

(b) Buyer in possession.

Where the buyer is already in possession of the goods, delivery takes place, if the seller agrees to the buyer holding the goods as

1 Re Roberts (1887) 36 Ch. D. 196, 200.
2 (1861) 6 H. & N. 828, 123 R. R. 860, Ex. Ch. distinguished in Dublin City Distillery v. Doherty (1914) A. C. 823.
3 (1835) 4 Ad. & E. 58.
4 (1801) 1 Camp. 452, 10 R. R. 727 See illustration (d) to old section 90 of the Indian Contract Act, 1872.
5 See Miles v. Gorton (1834) 2 Cr. & M. 504, 39 R. R. 820, approved in Grice v. Richardson (1877) 3 App. Cas. 319 P. C.
6 12 East 614.
7 In most of the above cases the question for consideration was whether there was receipt and acceptance to satisfy S. 17 of the Statute of Frauds.

owner[1]. Here also the character of the possession is changed from that of a bailee for the seller to that of an owner.

(c) Third party in possession.

When the goods are in possession of a third party as bailee for the seller, possession is usually given by a direction to such third party requiring him to deliver them to, or to hold them on account of, the buyer, followed either by actual delivery to the buyer or by some acknowledgment on the part of the third party that he holds the goods for the buyer[2]. The form in which such direction or acknowledgment is given is immaterial. Where the third party is a warehouseman the direction usually takes the form of a delivery order and the acknowledgment of a warrant for delivery of the goods or any entry in the warehouse books of the name of the buyer as the person for whom the goods are held. The acknowledgment, whatever its form does not change the nature of the warehouseman's possession ; he still holds as bailee, but for the buyer instead of the seller. He has simply attorned to the buyer[3].

It must be noticed that all the three parties must concur, otherwise there is no delivery. Accordingly. where the seller directed the warehouseman to transfer the goods sold to the buyer's order, and the warehouseman did so and sent the invoice and certificate of transfer by his clerk to the buyer with a request for payment; but the buyer refused payment it was held that there was no attornment, and therefore no delivery, as the buyer had not assented to the warehouseman holding the goods as his agent[4].

The mere handing of a delivery order or the like by the seller to the buyer is not sufficient[5]; the seller's bailee must be instructed and must assent to hold for the buyer. In *Farina* v. *Home*[6] the wharfinger gave the seller a warrant making the goods deliverable to him or to his assignee by indorsement on payment of rent and charges. The seller forthwith indorsed and sent it to the buyer, who kept it ten months and refused to pay for the goods or to return the warrant saying he had sent it to his solicitor and intended to defend the suit as he had never ordered the goods, adding that they would remain for the present in bond. *Held*, to be no actual receipt. The warrant was only an engagement by the wharfinger to hold the goods for the consignee, or his assignee, and attornment was necessary. But the facts showed sufficient evidence of acceptance to go to the jury[7].

1 Cain v. Moon (1896) 2 Q. B. 283 ; Blundell Leigh v. Attenborough (1921) 3 K. B. 235 : a case of pledge ; if the pledgee is already in possession, the contract of pledge is itself constructive delivery. Edan v. Dudfield (1841) 1 Q. B. 302, 55 R. R. 258.

2 S. 36(3) infra.

3 See Dublin City Distillery v. Doherty (1914) A. C. 823, 843, 852 where the authorities and the law are fully discuss. See also Farina v. Home (1846) 16 M. & W. 119.

4 Godts v. Rose (1855) 139 E. R. 1058 ; 104 R. R. 668 (a case where the buyer did not assent to the third party holding to the goods as his agent ; See Poulton and Son v. Anglo-American Oil Company, Ltd. (1911) 27 T. L. R. 216, C. A. for a case were there was no assent by the seller. As to the necessity for the bailee's assent, see section 36(3).

5 McEwan v. Smith (1849) 2 H. L. C. 309, 81 R. R. 166.

6 (1846), 16 M. & W. 129 ; 16 L. J. Ex. 73 ; 73 R. R. 423.

7 In the language of the English cases on the Statute of Frauds, taking and keeping a delivery order is evidence of acceptance, but not of receipt. The "actual receipt" of the Statute of Frauds, appears on the whole to correspond to the delivery of the present section, regarded, however, from the buyer's point of view.

When once assent of all has been obtained, there is effected a complete delivery as between seller and buyer, and any wrongful dealing by the third party will entail no liability on the seller[1].

In is also essential that the warehouseman be in actual physical possession of the goods, otherwise there would be nothing on which the attornment could operate. It is, however, clear that in such a case if the warehouseman attorns to the buyer without having actual possession, he may be estopped later on from denying his being in possession of the goods.

The goods also must be ascertained before there could be delivery by attornment. In *Laurie and Morewood* v. *Dudin and Sons*[2], A sold to plaintiff 200 quarts of maize out of 600 quarts lying with defendant. a warehouseman, and gave a delivery order. The defendant warehouseman entered the same in his books. *Held*, that the mere entry in the books did not operate as constructive delivery to the buyer and as there had been no ascertainment the stoppage must be upheld. But in *AngloIndia Jute Mill Co.* v. *Omademull*[3], where the plaintiffs had advanced money on the security of certain delivery orders in respect of goods in the possession of the defendants, it was held that the defendants had no lien when the cheque of the buyer was dishonoured and that they were estopped from denying that the goods had been paid for, or goods of the required quantity had been appropriated to the delivery order.

Delivery should have the effect of putting the buyer in possession.

Delivery should have the effect of putting the buyer in possession. And so, where the wood of fallen trees is sold the mere fact of the buyer cutting them up will not amount to taking possession of them until he carts them away[4].

In order to constitute delivery the buyer or his authorised agent must have possession of the goods. The Act does not define possession, but in order to constitute possession the buyer should be in a position to exercise some degree of control over the goods either directly or through an agent.[5] Section 1 (2) of the Factors Act 1889 (Engl.) defines possession as follows: "A person shall be deemed to be in possession of goods or of the documents of title to the goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf". It is not necessary to constitute delivery that the buyer should accept the goods; possession does not necessarily amount to acceptance. The buyer can reject the goods after delivery, but he cannot do so after acceptance.

1 Wood v. Tassell (1844) 115 E. R. 90; 66 R. R. 374.
2 (1926) I. K. B. 223.
3 (1911) 38 Cal. 127=1. C 859; (cf.) Eagleton v. E. I. Ry. Co. (1872) 8 Ben. L. R. 581. See also Shaw v. Bill (1884) 8 Mad. 38: where the seller was held liable; the third person though attorned to the buyer had not the goods in his possession.
4 Chotku Ram Nath Sabu, A. I. R. 1936 All 880= (1936) A. L. J. 1270.
5 See Pollock and Wright on 'Possession', pp. 43, 46.

Anything which has the affect of putting the goods in the possession of the buyer.

This phrase includes any act either by the seller or by the buyer with the assent of the seller whereby control of the goods is transferred from the seller to the buyer, according to the terms of the contract[1]. If the buyer, being entitled under the contract to some time for inspection, is not given any such opportunity or, being entitled to goods free from demurrage, is offered goods under demurrage, such offer of performance is not valid. Where delivery is not according to the terms of the contract it is no delivery at all so as to exonerate the seller from his liability to deliver[2]. As has already been noticed, a mere giving of the delivery order by the vendor to the vendee where goods are in possession of a bailee, is not sufficient to constitute a valid delivery unless and until it is also assented to by such bailee. But if the bailee agrees the delivery is complete and the property in the goods sold passes to the buyer.[4]

Effect of part delivery

34. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Part delivery—its effect.

This section repeats the provisions of old section 92 of the Indian Contract Act (See Appendix) and affirms the English common law rule that the delivery of the part may be a delivery of the whole, if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention.[5] It must be compared with sections 48 and 51 (7), which relate to the effect of delivery of part of the goods on transferring the possession in the remainder to the buyer, so as to put an end to the seller's lien or right of stoppage in transit.

"It seems to me", said Brelt L. J., "that a delivery of part, or even of the bulk of a cargo, is not *prima facie* a delivery of the whole and that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery of the whole[6]."

The delivery of part operates as a constructive delivery of the whole only where the delivery of part takes in the course of the delivery of the whole, and the taking possession by the buyer

1 Motichand v. Fulchand, 26 Cal. 142.
2 2 B. L. R (O. C.) 154; Bombay United Merchants Co v. Doolubiam and others, 12 Bom. 50.
3 Le Geyt v. Harvey, 8 Bom. 501; G. I. P. Ry. v. Hanumandas & Co., 14 Bom. 57.
4 8 B. L. R. 581; Ganges Manufacturing Co, v. Sourujmull & others, 5 Cal. 669; Ramdeo v. Cassim Mamoojee, 21 Cal. 173.
5 Lord Blackburn in Kemp v Falk (1882) 7 App. Cas 573, 586.
6 Ex parte Cooper (1879) 11 Ch. Div. 68, 73, C. A. If the cargo were one machine, or the like, in parts the delivery of an essential part might be such a circumstance, ib, at p. 75.

of that part in the acceptance of constructive possession of the whole[1], *i. e.*, a recognition that the actual holder of the residue has begun to hold as the buyer's agent. Where the buyer took delivery of a part without making any inspection, and sold that portion to third parties, the circumstances were held to point to delivery of part in progress of the delivery of the whole[2].

If part be delivered with the intention of separating it from the rest, it does not operate as a delivery of the whole[3] Where the buyer accepts delivery and pays for part of the goods but refuses to take delivery of the remaining portion of the goods as not conforming to the contract, there is no delivery of the whole; consequently, the seller can only sue the buyer for damages for non-acceptance, and not for the price[4]. The fact that each one of several bales agreed to be sold is to be paid for separately on delivery, indicates that the delivery of one bale is not intended to pass the property in all[5]. In *Bolton* v. *L. & Y. R. Co.*[6] referred to above, the buyer accepted and paid for three bales when sent but refused to accept the remainder when sent objecting to the weight and quality and returned them to the seller. The seller again returned them to the place where they were to be sent for delivery to the purchaser. Held, the rest of the goods were not delivered to the buyer and so transit was not at an end and the unpaid seller could stop it.

The intention in any particular transaction is a question of fact to be determined with regard to all the circumstances.

See Ss. 48 and 51 (7) as to the effect of post delivery on the seller's right of lien and stoppage in transit.

Illustrations

(1) In *Hammond* v. *Anderson*[7] specific goods lying at a wharf were sold for a lump sum. The seller left an order with the wharfinger to deliver the goods to the buyer, who had paid for them by a bill. The buyer subsequently weighed the goods and took away part of them. *Held*, there was a delivery of the whole of the goods.

In *Slubey* v. *Heyward*[8], the defendant being in possession, as sub-buyer of a cargo of wheat, of bills of lading which had been indorsed to him by the buyer, had ordered the vessel to Falmouth, with the seller's consent, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original seller attempted to stop the further delivery because his buyer had become insolvent. *Held*, that this constituted a delivery of the whole, ending the transitus.

(3) The buyer of a cargo of wheat made an assignment of his effects to trustees for the benefit of his creditors and endorsed the bill of lading to one of the trustees with an endorsement directing the master "to deliver possession of the withinmentioned quantity

1 Bolton v. L. & Y. R Co. (1866) L. R. 1 C. P. 431 at p 440, Pranlal Bhaichand v. Maneckji Petit Manufacturing Co., A. I. R. 1933 Bom. 46=140 I. C. 610.
2 Pranlal v. Maneckji Petit, supra.
3 Dixon v. Yates (1833) 5 B. & Ad. 313, 339, 341; 39 R. R. 489, 497, 499.
4 Mitchell Reid & Co. v. Buldeo Das (1887) 15 Cal. 1; Dixon v. Yates, supra.
5 Ibid.
6 (1866) L. R. I. C. P. 431.
7 (1803) 1 B. & P. N. R. 69, 8 R. R. 763.
8 (1795) 2 H. Bl. 504, 3 R. R. 486.

of wheot to R. J., being one of my assignees, to be disposed of as he may think proper." The ship arrived at an intermediate port and the trustees took samples of the wheat and sold the greater portion to sub-buyers, to whom it was delivered, and directed the master to take the remainder to the final port of destination, which he did. *Held*, that in those circumstances the whole cargo had been delivered at the intermediate port[1].

(4) In *Bunney* v. *Poyntz*[2], the buyer of a parcel of hay asked the seller's *permission* to take a part, and this was granted. It was held not to be a delivery of the whole. "Here", said Parke, J., distinguishing *Hammond* v. *Anderson*, "the intention of both parties was to separate the part delivered from the residue, and the vendee took possession of part only."

(5) If the contract be an entire contract, and incapable of severance, the delivery of a part, necessarily, is a delivery of the whole[3]. But if it is severable the delivery of a part is only delivery *pro tanto*[4].

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Buyer to apply for delivery

Buyer to apply for delivery.

This section repeats section 93 of the Indian Contract Act, 1872 (See Appendix). Although there is no specific provision in the English Act corresponding to it, the principle seems to have been well recognised in England also. As Sir Mackenzie Chalmers observes[5], "the assumed rule was, that it was for the buyer to take delivery, and that in the absence of any different agreement, the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery." It has also been remarked in Halsbury. Laws of England[6] :

"The rule assumed and stated by text-writers previously to the Act was that *prima facie* it is the duty of the buyer to take the goods, and that the seller's duty is fulfilled by his putting the goods at the disposal of the buyer at the place of delivery. There seems to be nothing in the wording of the Act to displace this rule."

Under the Indian law, as stated in this section, in the absence of express contract, the seller is under no duty to deliver unless the buyer applies for delivery, and the rule is not affected by the fact that the goods are to be acquired by the seller and when they

1 Jones v. Jones (1841) 8 M. & W. 431, 58 R. R. 765.

2 (1833), 4 B. & Ad. 568, 38 R. R. 309. See also Jackson v. Rotax motor (1910) 2 K. B. 937 : goods to be delivered as required. Buyer accepted part of the goods and rejected the rest. Held, he could do so.

3 Brewer v. Salisbury, 9 Barb. 511 ; Chamberlain v. Farr, 23 Verm. 265.

4 Story on Contract, S. 811.

5 Sale of Goods Act, 11th Edn., p. 92 ; citing Smith v. Chance (1819), 2 B. & Ald. 754, at p. 755 ; Wood v. Tassal (1844) 6 Q. B. 234, 60 R. R. 374. The learned author adds, "It seems a pity that a more definite prima facie rule has not been laid down by the Act."

6 Vol. XXIX ; p. 121, f. n. (p).

are acquired, the seller notifies to the buyer that they are in his possession: it is still the duty of the buyer to apply for delivery. Where the seller gives notice of arrival of the goods it is the buyer's duty to apply for delivery. In *Ganesh Das* v. *Ram Nath*[1], where the contract provided that on the arrival of the railway receipt and the invoice the buyer should receive them on payment of the price, it was held that the fact of the seller giving notice of the arrival of the goods does not dispense with the duty of the buyer to apply for delivery. Moreover, the application for delivery must be an effective application; if, for instance, the buyer is bound to pay the price on delivery, under section 32 he must when he applies for delivery be ready and willing to pay the price[2].

It is also necessary that the demand be made by the buyer himself or by somebody else on his account. Where a buyer assigned his contract and got a subsequent reassignment, and sought to adopt the assignee's demand for delivery, it was held that the section was not complied with as there was no demand on the buyer's own account[3].

On the other hand, it is the duty of the seller to deliver the goods when the buyer applies for delivery, and if the seller fails to do so, he is guilty of a breach of contract. Thus, where the contract provided for delivery in all November on seven days' notice from the buyer, and the buyer gave notice early in November, it was held that by the terms of the contract the buyer had the right to fix the date in November on which the delivery should be made, and the seller having failed to deliver as required by the notice was guilty of a breach of contract[4].

In *Siwayya* v. *Ranganayakulu*[5], a case under old section 93 of the Contract Act the corresponding words "special promise" were commented upon by the Judicial Committee and it was held that these words indicate an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery or the necessary implication of such a stipulation from the nature of the contract as expressed, and that it may arise also out of usage or custom of trade. It was further observed that in the absence of any proof of such custom or usage or any express or implied term in the contract, there is no special promise such as to absolve the buyer from his obligation under the section.

If the seller agrees to deliver on board the buyer's ship as soon as the latter is ready to receive the goods, the buyer must name the ship and give notice of his readiness to receive the goods on board before he can complain of non-delivery.[6]

1 A. I. R. 1928 Lah. 20=9 Lah. 148=111 I. C. 498; see also Ishardas v. Dhanpatrai, A. I. R. 1927 Lah. 687=8 Lah. 514; Kanivar Bhan v. Ganpat Rai, A. I. R. 1926 Lah 318=7 Lah. 442=91 I. C. 304; Mohanlal v. Gyaniram, A. I. R. 1935 Nag. 111=155 I. C. 778. (Buyer bound to send some one to take delivery.)

2 Ganesh Das v. Ram Nath, supra.

3 Mulji v. Nathubhai (1891) 15 Bom. 1. See also Juggernath v. Maclachlan, (1881) 6 Cal. 681; Kanooram v. Gopal (1875) 24 W. R. 178.

4 Juggernath v. Maclachlan, (1881) 6 Cal. 681.

5 A. I. R. 1935 (P.C) 67=58 Mad. 670=154 I. C. 1097.

6 Armitage v. Insole (1850), 14 Q.B. 728.

The condition precedent imported in all contracts by this section, apart from special agreement, to the buyer's duty to claim delivery, may, however, be waived by the seller and is waived impliedly where he so incapacitates himself from complying with the demand, by consuming, reselling, or otherwise disposing of the goods, as to render the demand idle and useless[1]. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied between the parties.[2]

Rules as to delivery

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf :

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Rules as to delivery—analogous law.

This section is a combination of section 29 of the English Act and old section 94 of the Indian Contract Act (See Appendices). The second part of section 29 (1) of the English Act has been omitted and

1 Remfry, p 256.
2 Section 36(1) infra; Yangtoze Ins. Association v. Lukmajee (1918) A. C. p. 589 P. C.

in its place the provisions of old section 94 of the Indian Contract Act have been substituted with the words 'manufactured or' added before the word "produced." Sub-sections (2) to (5) are the same as sub-sections (2) to (5) of section 29 of the English Act.

Place of delivery—sub-section (1).

Sub-section (1) clearly lays down that whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Thus, as to the *place* where delivery is to be made, this will generally be regulated by agreement, which is usually binding on both parties, but when nothing is said about it in the contract, the rule laid down in this sub-section is that goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, *i. e.* future goods, at the place at which they are manufactured or produced. It seems immaterial whether the goods are specific or unascertained or whether the parties have knowledge as to where they are. Generally speaking the goods are at the place of business or residence of the seller: and if not the parties are supposed to know where they are or where they will be produced or manufactured. So the buyer is supposed to know where the delivery is to be obtained. If however the buyer does not know where the goods are the seller must give him notice of the place where the goods are in order to enable him to apply for delivery. Consequently it follows that when the goods are to be produced or manufactured the seller must give notice to the buyer that they are ready before he could apply for delivery. Under the English Act, in the absence of any special agreement, "the place of delivery is the seller's place of business if he has one, and if not, his residence" unless the contract is for the sale of specific goods which, to the knowledge of the parties, are at some other place. The omission of second clause of sub-section (1) of section 29, of the English Act, is due to the fact that it is severely criticised by the text writers as not laying down a very definite prima facie rule[1]. The Legislature has, therefore, preferred the phraseology of section 94 of the Indian Contract Act, 1894, in its place[2].

The first portion of the sub-section deals more with the mode of delivery than with the place of delivery. As has already been pointed out under the last section the general rule is that the buyer should apply for delivery and the seller is not bound to deliver the goods unless a delivery is demanded by the buyer. Before the enactment of the English Sale of Goods Act, 1893, there was very little authority on the point the assumed rule being that it was for the buyer to take delivery, and that in the absence of any different agreement the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery.[3] Where there was sale of a cask of wine to be delivered at the buyer's house and the carrier delivered the wine there to an apparently respectable person

1 See Chalmers, p. 92.
2 See Special Committees Report.
3 See Wood v. Tassel, 6 Q.B. 234; Smith v. Chance, 2 B. & Ald. p. 755.

who signed for it and then made off with it, it was held that this amounted to a delivery to the buyer[1].

The parties are at liberty to agree that delivery should be given in any way or at any place. When a mode of delivery is indicated in the contract, it is for the benefit of both the parties and cannot be altered except by mutual consent[2]. In this case the contract provided delivery f. o. b. Liverpool. The buyer claimed to be entitled to waive the condition as to delivery and to take delivery of the goods before they were put on board the ship. It was held that the term as to mode of delivery was for the benefit of either party, and neither party could waive such term without the consent of the other porty, In *Grenon* v. *Lachmi Narain*[3] there was a contract for the sale of goods "to be delivered at and place in Bengal......to be mentioned hereafter." It was held that it did not fall within the operative part of old section 94 of the Indian Contract Act, for there was a special promise as to delivery, giving the buyer the right to fix the place any where in Bengal, and the words "to be mentioned hereafter," expressed only what the law would have implied that the seller was entitled to reasonable notice of the buyer's choice and that the matter did not fall within the ambit of section 94 at all, but rather under section 49 of the Contract Act ; there was in fact no question under that section that the buyers had demanded delivery at the Howrah railway station, and the sellers had refused it. Where the choice for the place for delivery had been given originally to the buyer, a mention by him of a reasonable place would be sufficient to compel the seller to deliver the goods at such place in fulfilment of the contract and such a contract would not fall within this sub-section which provides only for the cases where there is no special promise as to delivery[4]. In *Phul Chand* v. *Jugal Kishore*[5] the Lahore High Court held that the buyer should ask to have the goods made over to him at the seller's place of business and not at his own. This was also a case under old section 94 of the Indian Contract Act.

Where the place of delivery is within the option of either party, it is a condition precedent to the liability of the other party that he should receive notice of the place of delivery[6].

Where the goods are to be taken by the buyer from the seller's land or premises, the contract of sale by implication confers on the buyer a licence by the seller to the buyer to enter upon the land or premises to remove the goods[7]. It would appear that such a licence is irrevocable[8].

Distinction between contract of sale of goods and contract to deliver goods in payment of a debt.

1 Galbraith v. Grant & Block (1922) 2 K. B. 155.

2 Maine Spinning Co. v. Sutcliffe & Co. (1917) 87 L. J. K B. 382.

3 (1896) 24 Cal. 8 ; L. R. 23 I. A. 119.

4 See also Savage Mfg. Co. v. Armstrong, 19 Maine 147 ; Armitage v. Moole, 14 Q. B. D 728.

5 A. I. R. 1927 Lah. 693=8 Lah. 501=106 I. C. 10.

6 Davies v. McLean (1873) 21 W. R. 264 (sellers's option) ; Armitage v. Insole (1850) 14 Q. B 728 ; 80 R. R. 888, supra Sutherland v. Allhusen (1866) 14 L. T. 666.

7 Halsbury, Laws of England, Vol. XXIX ; p. 122 ; Jones v. Tankerville (1909) 2 Ch. 440, at p. 442 ; Liford's case (1614) 11 Co. Rep. 46 b, 52b ; Plowd. 16 a ; 77 E. R. 1206

8 Ibid.

A contract of sale differs from a contract to pay an existing debt in specific articles. Where it is agreed that a debt is to be satisfied by delivering specific articles, and no place of delivery is specified, the debtor must ask the creditor to appoint a place, and if the creditor fails to appoint a reasonable place, the debtor may himself appoint a reasonable place on giving notice to his creditor, and deliver the goods there. The same rule applies where the time of delivery is fixed although the place is not[1].

Delivery of goods in sea transit.

This sub-section does not deal with cases of "symbolic" delivery of goods in course of transit at sea by means of the bill of lading, or the conditions under which the buyer must pay against the shipping documents or is entitled to await actual delivery of the goods[2]."

Delivery "ex-ship."

In a contract of sale "ex-ship," the seller makes a good delivery if, when the vessel has arrived at the port of delivery, and has reached the usual place of delivery therein for the discharge of such goods, he pays the freight, and furnishes the buyer with an effectual direction to the ship to deliver[3].

Lord Sumner observed in this case :

> "In the case of a sale ex-ship, the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery, and has reached a place therein which is usual for delivery of goods of the kind in question. The seller, therefore, has to pay the freight or otherwise release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver."

Reasonable time—sub-section (2).

This sub-section corresponds to sub-section (2) of section 29 of the English Act which is declaratory of the common law rule. This sub-section provides that, where the seller is bound to send the goods to the buyer without application by the latter, he must send them within a reasonable time, if no time is specified in the contract.

The question what is a reasonable time is a question of fact;[4] accordingly evidence may be given of the surrounding circumstances in which the contract was made in order that that question may be determined[5], and also facts subsequently causing delay without the seller's fault[6] or causes on which the seller has no control. But if delivery be not made within a reasonable time, though the delay may not have been due to the seller's default, it may frustrate the

Per Couch C. J. in Dadabhai v. Salleman (1868) 5 B. H. C. A. C. 126, 128.

See E. Clemens Horst Co. v. Biddell Bros. (1912) A.C. 18, adopting Kenedy, L. J.'s dissenting judgment in (C. A.) 1911 1 K. B., at p. 952.

Yang-tsze Ins. Ass. v. Luckmanjee, (1918) A. C. 585 P. C.; 87 L. J. P. C. 111.

See section 63, post.

5 Ellis v. Thompson (1838) 3 M. & W. 445, 49 R. R. 679 : goods were described as ready for shipment but there was considerable delay in carrying them to the port of shipment from the mine ; held the buyer could reject the goods.

6 Hick v. Raymond (1893) A. C. 22, at p. 33 ; Re Carver & Co. and Sasson & Co. (1911) 17 Com. Cas. 59.

buyer's adventure and entitle him to refuse acceptance[1]. In *Re Carver & Co.*[2] the delay was due to ship getting stranded. It was held that the mere fact that the goods when it arrived were exposed to higher competitive market than that whsch was expected was not sufficient to warrant a finding that the commercial object of the contract was defeated, although the seller might be liable for damages for delayed delivery. Similarly, delay in discharging cargo may be excused when it is done within a reasonable time under the circumstances[3].

The sub-section applies only where the making of delivery depends entirely on the seller. If it depends on some concurrent act of seller and buyer, the only liability imposed is that each shall use reasonable diligence in performing his part in the joint act[4].

A contract by a manufacturer to supply some specified goods "as soon as possible," means within a reasonable time[5].

Where the seller is not bound to send the goods, but the buyer is bound to take possession of them from tha seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, shall receive them[6].

Days how counted

It has been held under the English Act that where a certain number of "days" are allowed for delivery, they are to be counted as consecutive days and include Sundays, unless the contrary be expressed[7], or a usage to that effect be shown[8]. If a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract[9]. A promise to deliver goods in two months *from* October 5 is fulfilled by delivery at any time on the whole day of December 5, so that an action against the seller would be premature, if brought before the 6th. Where, however, the last day of the period is a Sunday, it would seem to be doubtful whether it should not be excluded where delivery on that day would be a violation of the Sunday Observance Act, 1677[10]. In *Coddington* v. *Paleologo*[11] where the contract was for the delivery of goods, "delivering *on* April 17th, complete 8th of May," the Court of Exchequer was equally divided on the question whether the seller was bound to commence delivery on April 17. In *Cox* v *Todd*[12], a contract to deliver barley "alongside a sloop or warehouse in all April or sooner" was held not to have been fulfilled by the seller bringing the barley into dock on the 29th, four days being required for complete delivery.

1 Jackson v. Union Marine Insurance Co. (1874) L. R 10 C. P. 125, Ex. Ch.; Re-Carver & Co. and Sassoon & Co. supra.
2 (1911) 17 Com. Cas. 59, 67.
3 Hick v. Raymond (1893) A. C. 22. See also Wertheim v. Chicontimi Pulp Co (1911) A. C. 301; British Motor Body v. Shaw & Co. (1914) S. C. 922.
4 Ford v. Cotesworth (1868) L. R. 4 Q. B. 127, 133; Pearl Mill Co. v. Ivy Tannery Co. (1919) 1 K. B. 78.
5 Attwood v. Emery, (1856) 140 E. R. 45; 107 R. R. 595; (cf. Alagirisamy v. Runa Cheena, (1924) 19 L. W. 654 78 I. C. 326
6 Buddle v. Green (1857) 27 L. J. (Ex.) 33; 114 R. R. 991.
7 Brown v. Johnson (1842), 10 M. & W. 331.
8 Cochran v. Retberg (1803), 3 Esp. 121. See also Nielson v Wait (1885), 16 Q. B. D. 67 (C. A.).
9 Webb v. Fairmaner, (1838), 3 M. & W. 473.
10 See Child v Edwards, (1909) 2 K. B. 753.
11 L. R. 2 Ex 193.
12 7 D. & R. 131; See Benjamin on Sale, 7th Edn., pp. 719, 720.

It has been held that unless there is a custom to the contrary,[1] when the period fixed expires on a holiday the delivery should be made on the previous office day and not on the next office-day.[2] Where, however, the effect of the strict enforcement of the rule is to render the performance impossible, for instance where the whole period consists of holidays[3] or where the last day is Sunday and the performance is prohibited by the provisions of Sunday Observance Act[4] or where the act to be done is to be done not by the party but by the court or by the party in conjunction with the court and the court or its office is closed on the last day[5] the act in all these cases may be performed on the next practicable day. Where by the contract a party is to have so many days for doing an act the days mean consecutive days. including Sundays and other holidays unless there be a custom to the contrary.[6]

As to the meaning of 'month' see notes on pages 162 an d 163.

Delivery "as required" or "on request"

This sub-section assumes that nothing further remains to be done by the buyer. Where goods are deliverable to the buyer "on request" or "as required," or on similar terms, the seller is not bound to deliver the goods until the buyer calls for delivery. It is a condition precedent to the buyer's right of action that he should make his request either personally or by letter[7]. If the buyer calls for delivery, the seller must deliver the goods within a reasonable time thereafter[8]. If the buyer does not call for delivery within a reasonable time after the contract, the seller may give him notice to do so[9]. Where the contract does not limit the time for the buyer's request in a contract for goods to be delivered "as required," the buyer must require delivery within a reasonable time, but the seller cannot rescind the contract on the ground of delay without giving the buyer notice. "No doubt," says Pollock, C. B., "where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, *viz.*, that *every reasonable condition is also implied*, and it seems to me reasonable that the party who seeks to put an end to a contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them[10]".

But this rule is not an absolute rule—the facts may show (for instance by inordinate delay) a mutual intention to abandon the contract, or may show such conduct on the part of the buyer as to mislead the seller into believing that the contract has been abandoned and therefore to estop the buyer from setting it up[11]. If owing to

1 Lal Chand v. J. L. Kerston, 15 Bom. 338.
2 Motumal v. Ruttonji, 24 I. C. 883.
3 Mayer v. Harding, 2 Q. B. 410; Waterton v. Baker, L. R. 3 Q. B. 173.
4 Milch v. Frankan & Co, (1909) 2 K. B. 100.
5 Morris v. Barrett, 7 C. B. N. S. 139; Hughes v. Griffiths, 13 C. B. N. S. 324.
6 Brown v. Johnson, 10 M. & W. 331 (334).
7 Bach v. Owen (1793) 5 T. R. 409; See Radford v. Smith (1838) 3 M. & W. 254.
8 Bowdell v. Parsons (1808) 10 East. 359; G. N. Railway Co. v. Harrison (1852) 12 C. B. 576; 92 R. R. 786; Shep. Touch. (ed. Preston) 381.
9 See Halsbury, Vol. XXIX. (2nd Edn.).
10 Jones v. Gibbons (1853), 8 Exch. 920, at p. 922.
11 Pearl Mill Co. v. Ivy Tannery Co. (1919) 1 K. B. 78.

excessive delay by the buyer the seller is prejudiced, the seller may be discharged[1].

It has been observed that *prima facie* the buyer has whole of his life to call for delivery in such cases[2] and the rule as to reasonable time is excluded[3]. Therefore, the seller is not discharged, as noticed above, because the buyer does not call for delivery within a reasonable time after the contract, but the buyer's liability may be hastened by notice[4]. If the buyer fails to call for delivery within a reasonable time after the notice, the seller may repudiate the contract if it be an entire one[5]. Where, however, the property in the goods has passed to the buyer, the seller may, at his option, keep the goods, and charge the buyer the expenses for care and custody of the goods[6]. Where goods are deliverable by instalments each instalment to be separately paid for the contract is divisible, and partial breach by the buyer does not necessarily entitle the seller to repudiate the whole contract.[7] Where, however, the price is not apportioned in each instalment the seller is entitled to repudiate the whole contract if the buyer fails to take delivery of any instalment within a reasonable time after notice by the seller[8]. Similarly where the seller is not bound to send the goods, but the buyer is to take possession of them from the seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, shall receive them[9]. Similar principles *mutatis mutandis* apply to the buyer's liability to accept the goods where the time of delivery is indefinite and within the option of the seller[10].

Delivery "on demand"

The promisor of an act, which is to be performed "immediately on demand" or "on demand," or "on notice," is entitled to a reasonable time after demand or notice for complying with his promise[11]. The expression "forthwith" may mean no more than "without delay or loss of time." It is less strict than the expression "immediately."[12]

A contract for sale of goods provided that delivery was to be given "ex-godown as and when the goods come." The goods arrived on 2nd December, 1942, but the seller did not give delivery. The buyer demanded delivery on 9th December, 1942, but the demand was not complied with. In a suit for damages, held, that the contract was broken on 2nd December 1942 and the damages must be assessed on the basis of the market price on that date and not on 10th December, 1942[13].

1 See Ross v. Shaw (1917) 2 Ir. R. (K. B.) 367.
2 Danelley Rail and Dock Co. v. London and North Western Rail Co., L. R. 7 H. L. 550.
3 Ibid.
4 Jones v. Gibbons supra; Halsbury, Vol. XXIX. (2nd Edn.).
5 Ibid.
6 See Section 44, infra; Greaves v. Ashlin, 3 Camp. 425.
7 See Section 38(1), infra; Eastern Counties Ry. Co. v. Philipson, 16 B. 2.
8 Chanter v. Leese, 5 M. & W. 698; Kingdom v. Cox., 3 C. B. 522.
9 Buddle v. Green, 27 L. J. Exch. 33; Halsbury, vol. XXIX 2nd Edn: (1st Edn vol. XXV, p. 208).
10 Halsbury, vol. XXIX 2nd Edn., (1st Edition Vol. XXV, p. 210).
11 Brighty v. Norton (1862) 3 B. & S. 305; 129 R. R. 337; Tones v. Wilson (1862) 4 B. & S. 442; 129 R. R. 799. Moore v. Shelley (1883) 8 App. Cas. 285, 293, P. C.; Greenway Bros. v. Jones & Co. (1915) 32 T. L. R. 184; delay was in contemplation.
12 Roberts v. Brett (1865) 11 H. L. C. 337; 145 R. R. 728.
13 Muniswami Chetti & Co. v. Muniswami Chetti & Co, A. I. R. 1944 Mad. 418 = 1944 M. W. N. 275.

Sub-section (3)—goods in possession of third person—attornment of bailee.

This sub-section corresponds to sub-section (3) of section 29 of the English Act. It enacts that where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. The issue or transfer of any document of title to goods, however, operates as delivery even where the goods are in possession of a third person and is not affected by the provision of the rule.

The acknowledgment must be given with the consent of both seller and buyer[1]. In sub-section (3) the assent of the buyer and of the seller to the attornment is assumed: and it merely declares that there is no delivery until the bailee also assents. It is, therefore, the duty of both the seller and the buyer to do what is necessary to obtain the assent of the bailee[2]. If the third party refuses to acknowledge the buyer's title and the buyer has done all that he is required to do, the buyer may repudiate the contract[3]. If the buyer is in fault, the seller may treat the delivery as having been properly made[4].

It is to be observed that it is assumed that the property in the goods has passed, for the opening words are "where the goods at the time of *sale* are in the possession of a third person," and by section 4 (3) there is a sale only when the property in the goods is transferred from the seller to the buyer. An attornment, therefore, before the property has passed does not operate as a delivery, and is ineffectual except as an estoppel[5]. Thus an acknowledgment made while the goods are unascertained is ineffectual, although it would estop the person acknowledging from subsequently denying the buyer's right to possession[6].

If the third person is not in actual possession, there can be no constructive possession through him. Even if he attorns to the buyer, and is estopped as against him from denying possession, that will not amount to delivery by the seller to the buyer[7].

Buyer obtaining delivery order on a third person

A buyer of goods obtained from his seller a delivery order on a third person. But he was not in fact able to obtain delivery from that third person. Meanwhile the seller unaware of such non-delivery paid the price to the third person and sued to recover it from the buyer, on the ground that he was made to pay the third person by the failure of the buyer to inform his as to non-delivery of goods. It was held that the seller could not recover from the

Godts v. Rose, (1855) 139 E. R. 1058; 101 R. R. 668; London Founders' Assn. v. Clarke, (1888) 20 Q. B. D. 576.

See Smith v. Chance (1819) 2 B. & Ald. 753, 21 R. R. 485 (seller in fault); Winks v. Hassall (1829) 9 B. & C. 372 customs duties payable by buyer); Buddle v. Green (1857) 27 L. J. Ex. 33, 114 R. R. 991 (presenting delivery order).

Pattison v. Robinson, (1816) 105 E. R.

Bartlett v. Holmes, (1853) 138 E. R. 1347; 93 R. R. 658.

Busk v. Davis (1814) 2 M. & S. 397, 15 R. R. 288.

Ibid; see Swanwick v. Sothern (1839); 9 A. & El. 895; 48 R. R. 740; Hayman v. M. Lintock (1907) S. C, 936; Anglo-Indian Jute Mills v. Omodemull (1911) 38 Cal. 127.

M' Ewan v. Smith (1849) 2 H. L. C, 309; 81 R. R. 166; J. C. Shaw v. Bill (1885) 8 Mad. 38.

buyer the price for the goods which though were purchased, were not in fact delivered. It was further held that a buyer who had obtained a delivery order was not in law bound to inform the seller of the goods that he had failed to obtain delivery[1].

Proviso to sub-section (3)—documents of title.

The *proviso* to this sub-section takes documents of title to goods outside the scope and operation of this section. As a result of it, the transfer of a document of title to goods, which is defined in section 2 (4) *ante*, operates as a delivery of the goods themselves. All other documents require an attornment by the bailee[2]. Before the passing of the English Sale of Goods Act, 1893, the Common Law excepted only the bill of lading from the operation of this rule on the ground that it was the only document of title which *per se* transferred possession. So under the Common Law rules all other documents of title except the bill of lading required an attornment by the person in possession. Before the passing of this Act, this Common Law rule was also followed in India. Illustration (b) to section 90 of the Indian Contract Act (see Appendix) showed that an order on a warehouseman given to a buyer required the bailee's assent before it amounted to delivery.

Summing up the position under the English law, Sir Mackenzie Chalmers has observed :

> "As regards documents of title, the common law drew a hard and fast distinction between bills of lading and other documents. The lawful transfer of a bill of lading was always held to operate as a delivery of the goods themselves, because while goods were at sea they could not be otherwise dealt with. But the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as a transfer of possession ; and, as between immediate parties, there is nothing to modify the common law rule. If, however, a buyer or mercantile agent, who is lawful in possession of any document of title to goods, transfers it for value to a third person, the original seller's rights of lien and stoppage in *transitu* are thereby defeated[3]."

The subject is more fully dealt with under section 53.

Sub-section (4)—reasonable hour of delivery.

This sub-section corresponds to sub-section (4) of section 29 of the English Act. It altered the previously existing law in so far as it treated the reasonableness of the hour as a question of law, for determining which elaborate rules were laid down in the case of *Startup* v. *Macdonald*[4]. The sub-section makes the question what is a reasonable hour a question of fact.

Sub-section (5)—cost of putting the goods in deliverable state.

This sub-section corresponds to section 29 (5) of the English Act. It does not deal with the expenses incidental to delivery, but only with expenses of putting the goods in a deliverable state. The term "deliverable state" is defined in section 2 (3) *ante*.

1 Vishwanath v. Ram Narain Das, 1940 All. 405 = 190 I. C. 109.

2 Cf. Farina v. Home (1846) 16 M. & W. 119 ; 73 R. R. 433.

3 Sale of Goods Act, 11th Edn., p. 93.

4 (1843) 6 Man. & Gr. 593 ; 64 R. R. 810.

In the absence of an agreement to the contrary, the expenses of and incidental to, making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer[1]. Thus, when the contract is for delivery "ex-ship" the seller must do all that is necessary to release the ship owner's lien[2] and if "from the deck" pay all charges to be paid, such as harbour dues, to enable the goods to be removed from the deck[3]. Where goods are sold "F. O. B." the seller must bear the expenses of, and up to, shipment[4]. In a "C. I. F." contract, the seller is, as between himself and the buyer, chargeable with the amount of the freight and the insurance charges, and the buyer, if he pays of any such charges, can claim credit for them[5]. Wharfage charges incurred after shipment and delivery of the shipping documents fall on the buyer[6].

Agreements as to cost of delivery-interpretation of

Where a contract for the sale of sugar contained the term, "free on board a foreign ship" it was held that the seller was not bound to deliver the goods into the hands of the purchaser, or to transfer them into his name in the books of the warehouse where they were stored, but only to put them on board a foreign ship which it was the duty of the purchaser to name.[7] Where the contract of sale contained a term "the cotton to be taken from the quay" and the seller on its arrival warehoused the cotton and sent the buyer a delivery order which he refused to accept relying on this term as condition precedent, it was held that this was a stipulation introduced in favour of the seller and not a condition precedent, upon the performonce of which the buyer could insist, and that the contract amounted to a contract to delivery at a reasonable time and circumstances, the goods to be at the buyer's charge from the time of their landing on the quay[8]. Where the goods were agreed to be taken from the deck, it was held that the harbour dues charged to be paid before goods could be removed were payable by the seller.[9] Where the consignees of two cargoes of coal sold them to the Government on *c. i f.* terms, the latter guaranteeing their discharge "cost of stevedering to be paid by the Government," and it apprised that the consignees had, previously to the knowledge of the purchaser, agreed with the ship-owners to effect the discharge, "steamer paying one shilling per ton towards cost of same," it was held that the finding of the courts below that purchaser's contract had been fulfilled by payment of the said cost less the stipulated contribution by the ship owners was good[10]. Where goods were sold "cost, freight and insurance to buyer's wharf Victoris Docks London" and they were discharged in London elsewhere than at buyer's wharf and under the "London Clause" in the Bill of Lading certain charges were paid, it was held that these charges must be borne by the

White v. Williams, (1912) A. C 814; Neill v. Whitworth (1865) 18 C. B. (N. S.) 435; 148 R. R. 752; Acme Wood Flooring Co. v. Sutherland Innes Co. (1904) 9 Com. Cas. 170.

Yangtsze Insurance Association v. Lukmanjee (1918) A. C. 585, P. C.

Playford v. Mercer (1870) 22 L. J. 41.

Cowasjee v. Thompson (1845) 13 E. R. 454; 70 R. R. 27; Re Cook, (1879) 11 Ch. D. 560; Stock v. Inglis, (1884) 12 Q. B. D. 564.

Ireland v. Livingston (1872) 5 H. L. 395; Public Works Commissioner v. Houlder Brothers (1908) A. C. 276.

Acme Wood Flooring Co. v. Sutherland Innes Co., supra.

Wackerbarth v. Masson, 3 Camp. 270.

Neill v. Whitworth, L. R. I. C. P. 684, sub. nom. 11 L. T. 670.

Playford v. Mercer, 22 L. T. 41.

10 White v. Williams, (1912) A. C. 814.

seller and not by the buyer.[1] Where goods are sold at a price to cover freight and insurance to London or any named port, payment being by acceptance receiving shipping documents, the seller fulfills his contract when he puts the goods on board the ship and hands over to the consignee shipping documents and policy of insurance in conformity with the contract and in such a case the consignee would be liable to pay any charges in the nature of wharfage charges on the goods. Even if the goods do not come forward to their destination under the ordinary *c. i f.* contract the consignee having received the shipping documents and the policy of insurance, has his remedy either against the ship or on the policy[2]. So also delivery 'free on board' or what are known as *f. o. b.* contracts only means that the price shall be that which the seller stipulates for and the buyer shall not have to pay for the waggons or carts necessary to carry the goods from the place where they are, at the time of sale and that the seller shall bear all those charges and put them free on board the ship the name of which must, of course, be furnished by the buyer[3]. This rule may, however, be varied by an established usage to the contrary, as for instance, in London when goods are sold on terms "*f. o. b.*" the cost of shipping them falls on the seller, but the buyer is considered as the shipper[4]. If the goods dealt with by a *f. o. b.* contract are specific the words "*f. o. b*' means, according to the general understanding of the mercantile communities in England, something more than merely that the shipper was to put them on board at his expense. They would mean that he was to so put them on account of the person for whom they were shipped[5].

This section can be illustrated by the following examples:— Illustrations

(1) There was a sale of 12 puncheons of rum, made from molasses, of which 4 were delivered. The buyer pressed for delivery of the remainder, but the seller delayed and in the meantime an Act of Parliament was passed prohibiting the distillation of spirits from molasses, and annulling all contracts for the sale of such spirits. It was held that the sellers were liable in damages as having failed to deliver within a reasonable time[6].

(2) In *Stonard* v. *Dunkin*[7], a warehouseman at the request of the owner gave a written acknowledgment that he held a parcel of malt for the plaintiff, who had advanced money on a pledge of it by owner. Owner became bankrupt, and the warehouseman, defendant, attempted, in an action of trover, to show that the malt had not been remeasured which by a usage of trade was necessary to pass the property, and that the property therefore passed to the owner's assignees. Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff, 'the malt is not yours' after acknowledging to hold it on his account. By so doing they attorned to him, and I should

Acme Wood Flooring Co. v. Sutherland Innes & Co., (1904) 9 Com. Cas. 170.

Ibid. See also Ireland v. Levingston, L. R. 5 H. L. p. 406.

Re Cook, Exp. Rosevear. China Clay Co., 11 Ch. D. 560.

Per Lord Brougham in Cowasjee v. Thompson, 3 Moo. I. A. 422.

Stock v. Inglis, 12 Q. B. D. 564, approved in 10 App. Cas. 263, H. L.: Brown v. Hare, 27 L. J. Ex. p. 377.

Philips v. Blair & Martin (1801) 4 Paton, Scotch Appeal Cases 256.

(1810) 2 Camp. 344, 11 R. R. 724.

entirely overset the security of mercantile dealings were I now to suffer them to contest his title."

(3) In *Buddle* v. *Green*[1] there was a sale of slates lying at a named wharf, £10 to be paid as a deposit and the rest of the price to be paid and the slates removed on the 23rd February. Payment was made on the 24th February, and a delivery order was signed by the seller and given to the plaintiff. On the 3rd March the original seller of the slates stopped them, as it turned out, wrongfully, and the wharfinger refused to deliver them to the plaintiff when he presented the delivery order on the 5th March. This is no delivery.

(4) Sale of goods to be delivered in the last fortnight of March. Delivery is tendered at 9 P. M on March 31. It is a question of fact whether this is a reasonable hour. If it is not, there is no delivery, and the buyer may repudiate[2].

(5) Where there is sale of goods for ready money and the seller packs them up in the buyer's boxes and in the buyer's presence, but they remain in the seller's premises, there is no delivery[3].

Delivery of wrong quantity

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

Delivery of wrong quantity—analogous law.

This section is based on section 30 of the English Act (See Appendix). Section 119 of the Indian Contract Act (see Appendix) provided for the case of a seller sending to the buyer goods not

1 (1857) 27 L. J. Ex. 33, 114 R. R. 991.
2 Startup v. Macdonald (1843) 6 Man. & G. 593, 64 R. R. 810, Ex. Ch. [as modified by sub-section (4)].
3 Boulter v. Arnott (1833) 1 C. & M. 333.

ordered with goods ordered. The present section is more comprehensive. It provides for three different contingencies, *viz*., (1) the delivery of a quantity less than that contracted for; (2) the delivery of a quantity more than that contracted for; and (3) the delivery of goods contracted for along with goods not of the contract description. These provisions are, however, subject to any usage of trade, express agreement or course of dealing between the parties.

Sub-section (1)—short delivery.

As a general rule, "every contract for a certain quantity of goods is *prima facie* an entire contract for that quantity and so delivery of anything falling short of the specified quantity will not constitute sufficient delivery[1]." Subject to the rule *de minimis non curat lex*, the seller does not fulfil his contract by tendering less than the stipulated quantity and cannot call upon the buyer to accept it and equally the buyer cannot call for delivery of anything short of the full quantity unless he is prepared to accept the whole[2].

The court applies the *maxim de minimis non curat lex* where the deficiency is negligible[3].

If the contract is an entire contract for a specified quantity to be delivered in parcels from time to time, the buyer may return the parcels first delivered, if the later deliveries are not made, for the contract is not performed by the seller delivering less than the quantity sold[4]. If the contract is entire neither party can claim performance of a part unless the contract so provides[5].

In effect the tender of a less quantity by the seller amounts to a new offer inasmuch as the buyer must accept and pay for or reject the whole of the amount tendered; he cannot accept part and reject the rest[6] unless indeed the seller acquiesces in such a course, which would amount to an acceptance by him of a counter, offer by the buyer.

It is open to the buyer to waive his right of rejection and accept the goods, and in such a case, he is liable for the value of the goods, measured at the contract rate (which is deemed to be an index of the reasonable value)[7]. But by accepting the lesser quantity, the buyer is not precluded from suing for damages on the ground of short delivery[8] or claiming a proportionate refund where he has paid as for the whole of the quantity contracted for[9]. In *Beck* v. *Szymanowski*[10] the contract was for the sale of a quantity

1 Mersey Steel Co. v. Naylor (1884) 9 A. C. 434; Harland v. Burstall, (1901) 84 L. T. 324.
2 Kingdom v. Cox (1848) 5 C. B. 522, at p. 526.
3 Jackson v. Rotax Motor Co. (1910) 2 K. B. 937, C. A.; Harland v. Burstall, supra.
4 Oxendale v. Wetherell (1829) B. & C. 386, at pp. 387-388, per Parke J.; 33 R. R. 207, 208, 209; See also Colonial Ins. Co. of N. Z. v. Adelaide Marine Ins. Co. (1886) 12 App. Cas. 128, at pp. 138, 140; Harland v. Burstall, supra.
5 See Reuter v. Sala (1879) 4 C. P. D. 239.
6 Champion v. Short (1807), 1 Camp. 53, 10 R. R. 631.
7 Bragg v. Cole (1821) 6 Moore (C. P.) 114; Shipton v. Casson (1826) 5 B. & C. 378; Harland v. Burstall, supra.
8 Beck v. Szymanowski (1924) A. C. 43, H. L.; Gorrison v. Perrin (1857) 2 C. B. N. S. 681, 109 R. R. 830
9 Behrend v. Produce Brokers, (1920) 3 K. B. 530.
10 Supra.

of sowing cotton to be accepted and paid for and to be deemed in all respects according to the contract unless objected to within 14 days after delivery. Later the cotton was found to be less than the stipulated quantity. It was held that the condition applied to quality, not quantity, and the buyer was entitled to damages for short delivery. He might still have been so entitled, even if the condition had applied to quantity (per Lord Wrenbury, at p. 52). The buyer by accepting when he is entitled to reject waives the condition but may still treat the breach of it as a breach of warranty.[1]

Where goods have been rejected for short delivery or excess delivery, it is open to the seller to make, within the time limited, another delivery in conformity with the contract.[2]

Illustrations

In *Behrend* v. *Produce Brokers Co.*[3] there were two contracts for sale of cotton seed to be shipped in Alexandria and delivered in London to buyers' craft alongside payment to be in London in exchange for shipping documents. Part of the seed was delivered in London after payment by the buyers. The ship then left for Hull with the rest of the seed in order to discharge other cargo. She returned to London in a fortnight, and the balance of the seed was tendered to the buyers, but they refused to accept it; *held*, that each parcel of the goods was indivisible and that when the delivery had begun the buyers were entitled to receive the whole quantity before the ship left the port that they were entitled to keep the seed actually delivered and to be repaid the price of the balance.

In *Champion* v. *Short*[4] the defendant ordered of the plaintiff half a chest of French plums, two hogsheads of raw sugar and 100 lumps of white sugar. Only the raw sugar and plums were delivered. The defendant accepted the plums but refused to pay for the raw sugar, as the white sugar had not been delivered. *held*, that by accepting the plums the defendant had consented to a new contract for the plums and the raw sugar, and must pay for both. It follows from the principle of this case that had the plaintiff acquiesced in the defendant's refusal to pay for the raw sugar, the new contract would have been confined to the plums only.

Contract for purchase of 3,000 tins of canned fruit from Australia to be packed in cases of each containing 30 tins. When the goods are tendered in London a substantial part is tendered in cases containing 24. The buyer may reject the whole[5].

Sub-section (2)—delivery in excess of contract quantity.

This sub-section relates to excess delivery. If more goods are sent than the purchaser agreed to buy, he may refuse to receive any portion of the goods so sent, and is not bound to incur risk or trouble in selecting some of the things and sending back

Cf. Barker Junior & Co. v. Agius Ltd. (1928) 43 T. L. R. 751, 33 Com. Cas. 120 and S. 13 (2).

Borrowman v. Free, (1878) 4 Q. B. D. 500.

(1920) 3 K. B. 580 ; 90 L. J. K. B. 143; See also per Wright J., Barrow v. Phillips, (1929) 1 K. B. 574, 98 L. J. K. B. 193.

4 1 Camp. 53.

5 Moore & Co. v. Landauer & Co. (1921) 2 K. B. 519 (C. A.).

others[1]; still more is this the case where the superfluous goods are not of the quality ordered[2]. In *Cunliffe* v. *Harrison*[3] 10 hogsheads of claret were ordered and the seller sent 15. The buyer was held entitled to reject the whole. "The delivery of fifteen hogsheads, under a contract to deliver ten is no performance of that contract for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." In *Hart* v. *Mills*[4] where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned.

In this case also the buyer may reject the whole quantity delivered, or he may accept the goods included in the contract, and reject the excess. He cannot, however, claim to accept only part of the contract quantity or of the excess, except under a new contract[5].

If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate[6]. If the buyer accepts the greater quantity he cannot afterwards sue for mis-delivery[7].

In *Daraisami* v. *Subhana*[8] a case under section 119 of the Contract Act, the principle that rejection was proper, if there is risk or trouble in separating the goods ordered from the goods not ordered was applied.

The rule of *de minimis non curat lex* applies also to the case of a slight excess delivery. Accordingly where the contract was for the sale of wheat which, with a limit of variation provided for in the contract, might amount to 4,950 tons, and 55 lb more were tendered. but not charged for, it was held, that the buyer must accept the delivery.[9] The burden of proving that a breach of contract falls within the principle *the minimis non curat lex* is on the party seeking to excuse the breach[10]. In *Vigers Bros.* v. *Sanderson*,[11] 33 per cent. of the goods tendered were not "about the specification"; nor commercially within its meaning. It was held that the buyer could reject the whole. In *Barrow Lane, etc. Co.* v. *Phillip*[12] it was held that the buyer must have knowledge of the quantity delivered before he would be bound by any election.

Sub-section (3)—mixed delivery.

This sub-section deals with mixed goods and lays down that where the seller delivers to the buyer the goods he contracted

1 Cunliffe v. Harrison, 6 Exch. 903; 20 L. J. Ex. 325; Dixon v. Fletcher, 3 M. & W. 146; Rylands v. Kreitman, 19 C. B. N. S. 351; Hart v. Mills 15 M. & W. 85; 15 L. J. Ex. 200; Jugal Keshwar v. Kishori Lal A. I. R. 1924 Pat. 159=74 I. C. 923.

2 Levy v. Green, 1 E. & E. 969; 117 R. R. 552, Ex. Ch.

3 Supra.

4 15 M. & W. 85, 15 L. J. Ex. 200; 71 R. R. 578.

5 See also Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 127.

6 Ibid, p. 128.

7 So held by Acton, J. in Gabriel Wade & English, Ltd. v. Arcos, Ltd. (1929) 34 L. 1 L. Rep. 306.

8 (1927) M. W. N. 549=105 I. C. 613= A. I. R. 1927 Mad. 880.

9 Shipton Anderson & Co. v. Weil Bros. (1912) 1 K. B. 574.

10 Ranaasen & Son v. Arcos, Ltd. (1932) 37 Com. Cas. 291, C. A.

11 (1901) 1 K. B. 608.

12 (1929) 1 K. B. 574, 588.

to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole[1].

Section 119 of the Contract Act limited the buyer's right to reject to cases where "there is risk or trouble in separating the goods ordered from the goods not ordered." This was based on the case of *Levy* v. *Green*[2] in which there was sale of certain articles of China. The seller packed with them other articles of China, which had not been ordered and were clearly distinguishable and sent them to the buyer. It was held that the buyer was entitled to reject the whole.

Thus under the old Act the buyer's right to reject the goods was limited. This sub-section modifies the law in favour of the buyer. Under the present law the buyer is not bound to accept the goods, however easy it may be to separate the goods which are contracted to be sold from the others, for "mixed with" means no more than "accompanied by.[3]"

Where a contractor for the supply of coal sent coals partly according to contract and partly not, and mixed them all together in delivery, it was held that the whole quantity so delivered must be considered not according to contract.[4]

Where articles are added for purposes of packing, is it a mixture? Apparently not.

In *Paul* v. *Pim*[5] there was a sale of "the cargo of maize shipped per *Ss. Rijn* consisting of about 2,813 French tons, or what steamer carries as per bill of lading." The ship was loaded with maize of the contract quantity but in addition to it there was on board 58 tons of tobacco which was smuggled on board without the knowledge of the seller and which was not mentioned in the bill of lading. Held, the maize shipped answered the description—"the cargo of maize as per bill of lading." and the buyer could not reject. One of the grounds of the finding of the court was that the tobacco which was on board was of an entirely and absolutely different nature from the cargo of maize and so there was no possibility of confusion between the two. The case was distinguished from *Borrowman* v. *Drayton*[6] where however the excess goods were of the same quality, and the word "cargo" was given the natural meaning, *e. g.* the entire quantity of goods boarded on board a vessel for particular voyage.

"Description"—"goods of inferior quality."

The word "description" in section 30 (3) is to be strictly construed. Thus where goods of the kind ordered were delivered, but some of them were of inferior *quality*, *held*, that the case was not within section 30 (3), and the buyer could not accept such part

1. See William v. Agius (1927) 43 T. L. R. 751.
2. (1859) 1 E & E. 969, 117 R. R. 559, Ex. Ch.
3. Moore & Co. v. Landauer (1921) 1 K. B. 73; affirmed (1921) 2 K. B. 519, C. A. supra.
4. Nicholson v. Bradfield Union (1866) L. R. 1 Q. B. 620; see also Levy v. Green, supra.
5. (1922) 2 K. B. 360.
6. (1876) 2 Ex. D. 15, followed in Forbes v. Tullockchand (1878) 3 Bom. 386.

only of the goods as was according to the contract, and reject the rest; his remedy is to accept or to reject all[1]. It would seem that in such a case, if the contract is severable, the sub-section would apply[2].

Sub-section (4)—trade usage or special agreement.

Sub-section (4) declares that the provisions of this section are subject to any usage of trade. special agreement or course of dealing between the parties.

The quantity to be delivered is sometimes stated in the contract with the addition of word such as "about" or "more or less" which according to trade usage may show that the seller is to be allowed a certain moderate and reasonable latitude in the performance. Thus, by usage of trade a delivery order for about the quantity of goods sold, from a warehouse may be valid.[3] The seller may protect himself by using the term "more or less," or a similar expression[4]. Again, parties may agree that the quantity stated shall be only a maximum, in which event the buyer will be bound to accept less than the quantity stated[5]. It may be open to the parties to show that in a particular trade or market certain qualifying words have got particular special meanings[6].

The contract may itself provide certain limits of permissible variation which must be strictly observed[7].

The quantity contracted for under a contract of sale of goods may sometimes be determined by reference to a particular standard (*e, g.*) a lot of goods lying at a warehouse[8].

Where A agreed to sell B all the red pine spars manufactured by him "say about 600" out of a particular lot a tender of 496 was held to be a proper performance[9]. The word "cargo" is a word of reliable meaning, according as it occurs in a charter party, a policy of insurance, or a contract of sale[10].

It has been held that the natural meaning of "cargo" is the entire quantity of goods loaded on board a vessel on a particular voyage[11]. In a contract for sale of the remainder of a cargo "more or less" 5,400 quarters of wheat, the buyer was held bound to accept 5,979 quarters which were found to remain[12].

Similarly, in a contract of sale of "200 tons 5 per cent; more or less, the buyer was held bound to accept 190 tons[13] and the seller liable

1 Aitken, Campbell & Co. v. Boullen, (1908) Sess. Cas. 490.
2 See Chalmers, Sale of Goods Act, 11th Edn., p. 95.
3 Moore v. Campbell, (1854) 156 E. R. 467 : 102 R. R. 601.
4 Re Thornett & Fehr & Yuills (1921) 1 K.B. 219. See Mc'Connell v. Murphy (1873) L. R. 5 P. C. 203.
5 Morgan v. Gath, (1865) 159 E. R. 726 : 140 R. R. 714.
6 Societie Anonyme & Co. v. Scholefield (1902) 7 Com. Cas. 112.
7 Payne v. Lillico, (1920) 36 T. L. R. 569 : 2 per cent. more or less; the buyer could reject when the goods supplied were considerably in excess.
8 Tancread v. Steel Co. of Scottand, (1890) 15 A. C. 125
9 Mc'Connell v. Murphy, (1873) 5 P. C. 203.
10 Colonial Ins. Co of N. Z. v. Adelaide Marine Ins. Co. (1886) 12 App. Cas. 128, at p. 129.
11 Borrowman v. Drayton (1876) 2 Ex. D. 15; Kreuger v. Blanck (1870) L. R. 5 Exch. 179; Forbes v. Tullockchand (1879) 3 Bom. 386.
12 Harrison & Micks Lambert Co., re (1917) 1 K. B. 755.
13 Re Thornett & Fehr & Yuills Ltd., supra.

for non-delivery of 190 tons. The contention that the phrase "5 per cent. more or less" operated only to recover accidental or unimportant variations from the quantity stated in the contract, was not accepted. The quantity specifid is taken, in such cases, as representing a mere anticipatory estimate. But if the term used is "not lese than" it is taken as an absolute contract for delivery of the minimum[1].

In *Tebbith Bros.* v. *Smith*[2] there was sale of "quantity of salved Australian basils estimated 8/10 tons at a certain price per lb ", but the seller failed to deliver more than 6 tons 3 cwt. and 2 qr. Held, there was a sale of a specific balance of goods which had been salved from a wreck and the seller was not bound to deliver a minimum quantity of 8 tons. Where the seller agreed to sell all the naptha he might make during two years, "say from 1.000 to 1,2000 gallons a month, and the seller delivered 300 gallons being all that he made, it was beld that he was not liable to deliver more[3]. In *Doe* v. *Bowater Ltd.*[4] there was sale of coal "up to 2500 deep quantity 1750/2500 tons." It was held that the buyers could not demand more than 2,500 tons and the seller could not tender less than 1,750 tons. In *Tancred, etc. Co.* v. *Steel Company of Scotland*[5] the plaintiff agreed to supply "the whole steel" required for the Forth Bridge which also provided that "the estimated quantity of steel we understand to be 30,000 tons, more or less." Held, the plaintiff were entitled to supply the whole of the steel required for the bridge, and that their right was not qualified or affected by the clause.

Determination of goods contracted for.

It is thus clear that the quantity of goods contracted for is determined by the construction of the contract. Such quantity may be specified by reference to particular circumstances or a particular standard, as for example on entire lot deposited in a particular warehouse all goods manufactured by the seller or required by the buyer[6]. If the buyer renders the ascertainment by the standard prescribed in the contract impossible the seller is discharged of his duty to deliver the goods[7]. If, in such a case, a specified quantity is also mentioned with the addition of qualifyingwords such as 'about' or 'more or less' such quantity unless the contract shows that it is material[8], *prima facie* represents only an anticipative estimate and is not considered a term of contract.[9] Such an estimate, however, may be taken to specify a minimun quantity contracted for[10]. Where, however, the quantity is not specified by reference to particular circumstances or standard, the quantity of goods mentioned in the contract is material, subject, where qualifying words are used to a

Leeming v. Snaith (1851), 117 E. R. 884 ; 83 R. R. 448. But see Kaliyanjee Shorrock, (1910) 37 Cal. 384=6 I. C. Exch. 924.
(1817) 33 T. L. R. 508. See Gorissen v. Perrin as to distinction between "bales" and "packages."
G. William v. Daniel, (1835) 2 C. M. & R. 61.
4 (1916) W. N. 185.
5 (1890) 15 A. C. 125.
6 Tancred, Arrol & Co. v. Steel Co. of Scotland 15 App. cas. 125 ; Wood v. Copper Mines Co. 14 C. B. 428.
7 Pringle v. Taylor, 2 Taunt, 150.
8 Bourne v. Seymore, 16 C. B. 337.
9 Heyward v. Scougall, 2 Camp. 56.
10 Leeming v. Snaith, 16 Q. B. 275.

reasonable latitude[1], or where by the terms of the contract, usage of trade or otherwise, the qualifying words mean a definite latitude, to that latitude[2]. What is a reasonable latitude is a question of fact.

For more details, see Benjamin on Sale, 7th Edn pp. 734-746, where the cases on these points are collected.

Instalment deliveries

***38.** (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments it is a question in each case depending on the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

Instalment deliveries—analogous law.

This section is based on section 31 of the English Act. Sub-section (1) is in fact a corollary to the proposition set out in section 37(1) and lays down that, in the absence of a contract, express or implied, a buyer is not bound to accept by instalments the delivery of the goods sold to him.

It was held in some of the old cases that where a contract provided for delivery by instalments, either expressly or impliedly, the refusal by the seller to deliver or by the buyer to accept or pay a particular instalment was a breach which went to the root of the contract[3]. A contrary view was, however, held in other cases.[4] The latter view was followed in India also[5]. "The true rule in such cases is that each case should be judged on its own facts. Sub-section (2) of section 31 of the English Act gives effect to that principle. This sub-section, however, does not contain a full statement of law on the point. It only provides for a defective delivery on the part of a seller. In our opinion the rule ought to apply where the seller omits or refuses to make a delivery. We have,

1 Hewer v. Sale, 4 C. P. D. 239 C. A.; Moore v. Campbell, 10 Exch. 323.

2 Societe Anonyme etc., supra.

* **Analogous law.**

Section 31 of the English Sale of Goods Act, 1893, which is the same as section 38 of the Indian Sale of Goods Act, 1930, with the words "no delivey or" omitted between" "seller" and "defective."

3 Withers v. Reynolds (1831) 2 B. & Ad. 882 · Hoare v. Rennie 29 L. J. Ex. 79; Honck v. Muller (1881) 7 Q. B. D. 92.

4 Jonassohn v. Young (1863) 32 L. J. Q. B. 385, Simpson v. Crippin (1872) L. R. 8 Q. B. 14; Freeth v. Burr (1874) L. R. 9 C. P. 208.

5 I. L. R. 4 Cal. 252; 9 Mad. 359 18 Mad. 68; 63 P. R. 1914, p. 214.

therefore, inserted the words 'no delivery or' after the words 'the seller makes' in sub-section(2)[1].

Sub-section (1)—entire and severable contracts.

As already noticed, in the absence of a provision in the contract or of any usage to that effect the performance of an entire contract cannot be divided either by the buyer or seller. If in such a case the seller tenders delivery of a part the buyer is not bound to accept it, but if he accepts it he does so as on a new contract and must pay for it at the contract rate[2]. Whether the acceptance of a part discharges all the obligation of the old contract will depend on the terms of the tender and acceptance. The buyer also cannot claim performance of an entire contract by instalments[3].

The performance of an entire contract cannot be split up without mutual consent. But a contract, though entire, may provide that it may be performed by parts or instalments, *e.g.* where deliveries are to be made from time to time by separate instalments either in specified quantities or as the seller finds it convenient to do. This sub-section lays down that in the absence of an agreement to the contrary, the buyer of goods is not bound to accept delivery thereof by instalments[4]. And conversely, he cannot call for an instalment[5]. Where there is an agreement (which may be either express or implied) for delivery by instalments, the contract is not split up into separate contracts for each instalment; the contract is still an entire contract for the whole quantity, though it is divisible in performance[6]. The seller is, therefore, liable if he fails to make up the complete quantity, and cannot recover any part of the price[7] unless there be a provision that instalments are to be separately paid for. If there be such a provision, he may recover the price of any instalment delivered, and the buyer is bound to accept any instalment tendered in due course of performance[8], though this will not preclude him from rejecting a subsequent instalment, if he is otherwise entitled to do so[9], and if he wishes so to do, he may reject the contract[10]. But the seller still remains liable to make up the complete quantity of the goods contracted for, though the fact that he makes a partial default may not justify the buyer in repudiating the *contract*.

In *Reuter* v. *Sala*[11] there was a sale of 25 tons of pepper October/November shipment. The seller shipped 20 tons in November

1 Report of the Special Committee.
2 S. 37(1).
3 Kingdom v. Cox, (1884) 5 C. B. 522.
4 Sadasook v. Chaitram A. I R. 1926 Cal. 218=88 I. C. 910=29 Cal. W. N. 808.
5 Kingdom v. Cox (1848), 5 C. B. 522; 17 L J. C. P. 155.
6 Mersey Steel Co. v. Naylor (1884), 9 A. C. 434, at 439; Honck v. Muller (1881), 7 Q. B. D. 92, at 100; Ballantine v. Camp (1923), 129 L. T. 502; Ganesh Das-Ishar Das v. Ram Nath, A. I. R. 1928 Lah. 20=(1928) 9 Lah. 148.
7 Waddington v. Oliver, 9 R. R. 614; Oxendale v. Wetherell, 7 L. J. K. B. 264; Burn & Co. v. Morvi State, A. I. R. 1925 P. C. 188=90 I. C. 52.
8 Brandt v. Lawrence (1876) 1 Q. B. D. 344, C. A.; Howell v. Evans (1926) 134 L. T. 570; 42 T. L. R. 310: engravings to be sent as published.
9 Jackson v. Rotax Motor & Cycle Co. (1910) 2 K. B. 937, C. A.
10 See Borrowman v. Free (1878) 4 Q B. D. 500, C. A.; British & Beningtons Ltd. v. North Western Cachar Tea Co. (1923) A. C. 48, at p. 71.
11 (1879) 4 C. P. D. 239, C. A.

and five tons in December. The buyers were held entitled to reject the whole 25 tons.

Divisible contract

There are again contracts in which each instalment is to be paid for separately, and a breach (*e.g.* defective delivery, neglet or refusal to deliver) regarding one or more instalments does not necessarily discharge the performance of other instalments. Here the contract is severable, and each instalment is considered deliverable as if under a separate contract. These are frequently termed as instalment contracts. It is a question of the construction of the contract in each case as to whether an entire contract is to be split up for the purpose of performance only or whether there are separate and severable contracts. Delivery by instalments may also be implied from the course of dealing between the parties, from the circumstances of the case or from usages of trade. Sometimes the contract specifically provides that delivery of each instalment is to be treated as under a separate contract.

Where the contract provides for each instalment to be paid for separately, the buyer must duly accept and pay for it, as already noticed above, but the contract may still from its nature, be entire (as in the case of a contract for a book brought out in parts); so that the seller's failure to complete the full delivery may amount to a total failure of consideration, and entitle the buyer to return all instalments that he has received and recover all sums that he has paid; for when the consideration is entire, by failing partially it fails entirely[1]. The buyer therefore is not, in such a case, relegated to a mere right to sue for damages[2].

Agreement may be express or implied

An agreement to accept delivery by instalments may be either express or may be inferred from the conduct of the parties and the circumstances of the case[3], as when the buyer accepts delivery of an instalment without objection[4].

In *Brandt* v. *Lawrence*[5] where there were two contracts for sale of Russian oats, 'shipment by steamer or steamers' and payment for any shipment to be by cash on receipt of shipping documents, it was held that the shipment was intended to be in different parcels, and that the buyer was bound to accept them as they came, if they were in time.

In *Richardson* v. *Dunn*[6] there was a sale of 200—300 tons of coal to be shipped as early as possible by a named ship or other vessel. The named ship was not available and the seller shipped 152 tons on another ship, informing the buyer that he had done so and that he had drawn on him for the price and proposing to ship the remainder later. The buyer made no reply to this communication. The ship was lost. In an action by the seller for the price it was

Chanter v. Leese (1839) 5 M. & W. 698, at p. 702, 51 R. R 548, 600 Ex. Ch.

See section 39 of the Indian Contract Act.

Brandt v. Lawrence, supra ; Jackson v. Rotax Motor Co. (1910) 2 K. B. 937. C. A. ; Colonial Ins. Co. v. Adelaide Marine Ins Co. (1886) 12 App. Cas. 128, 138 P. C. ; Howell v. Evans (1926) 42 T. L. R 310.

4 Tarling v. O'Riordan (1878) 2 L. R. Ir. 82, C. A. at p 86 ; Bragg v. Cole (1821) 9 Moo. (C. P.) 114.

5 (1876) 1 Q. B. D. 344.

6 (1841) 2 Q. B. 218.

held that the buyer had impliedly assented to the shipment of the smaller quantity as an instalment and was liable to pay for it.

Such an agreement may be inferred from the nature of the contract itself *e,g.* when it is obvious that the full quantity of the goods cannot be delivered in one delivery as, for instance, in the case of contracts for the supply of provisions for the army and navy[1].

"Average" instalments

In *Barningham* v. *Smith*[2] the goods were to be delivered "at the fair average rate of twenty waggons a day". It was held that the rule would seem to be that a deficiency at the end of one unit of time may be made up in the succeeding unit, provided that at the expiration of any particular time (to be determined by the jury) there is no obvious deficiency in the sum of the instalments delivered. In that latter event the seller will have committed a breach of contract, and the deficiency cannot be made up afterwards by thrusting on the buyer the arrears.

But the word "average" has sometimes been explained as meaning "about equal monthly quantities.[3]"

Where amount of instalments not specified

It has been held under the English law that where the amount of the instalments is not specified. the *prima facie* rule would seem to be that the deliveries should be rateably distributed over the contract period; but if it can be gathered from the terms of the contract or the cicumstances that rateable deliveries were not intended, it then becomes a question for the jury whether the tender of, or demand for. delivery is a reasonable one[4].

In *Simson* v. *Gorachand*[5] there was a contract for the delivery of 7500 bags of castor seeds which were to be shipped "per steamers" and then the contract stated that "2500 bags in December, etc., terms cash on delivery, etc." The seller on the 12th December tendered 1690 bags arriving by a particular steamer but the buyer refused to accept the same as being less than 2500. On the 17th December the seller tendered 810 bags being the balance and the buyer refused to accept the same on the same ground. *Held*, that the tenders were in terms of the contract and the buyer was bound to accept the same. "That so far as 2500 bags to be delivered in December, having been shipped by "steamers," which I think, clearly means shipped by any number of steamers, provided that the instalment sent by each steamer is a reasonable one.[6]"

If delivery of an instalment is postponed by mutual consent then the seller should have a reasonable time to deliver the balance.[7]

1 Colonial Insurance Co. of New Zealand v. Adelaide Insurance Co. (1886) 12 App. Cas. 128, at pp. 138-139 ; P. C.
2 (1874) 31 L. T. 540.
3 Ireland v. Merryton Coal Co. (1894) 21 S. C. 989, See also Benjamin on Sale, 7th Edn., p. 758.
4 Calaminus v. Dowlais Iron Co. (1878), 47 L. J. Q. B. 575: equal monthly deliveries could not always be presumed. Brandt v. Lawrence, supra ; Wright, Stephenson & Co. v. Adams & Co. (1908) 28 N. Z. L. R. 193 ("portion each month") ; Coddington v. Paleologo, (1867) 2 Ex. 193 (Delivery should be in reasonable instalments ; Barningham v. Smith, (1874) 31 L. T. 540.
5 (1883) 9 Cal. 473.
6 Per Garth C. J. at p. 478.
7 Tyers v. Rosedale, etc. Co. (1875) L.R. 10 Ex. 195. See also Bowes v. Shand (1877) 2 A. C. 455.

Severable contract—sub-section (2).

A contract may provide for delivery by instalments, and payment for each instalment, and be of such a nature that each delivery is really like a delivery under a separate contract, to be paid for separately. This sub-section lays down that in the case of such a contract it is a question of fact whether the failure to deliver or the defective delivery of any instalment is tantamount to a repudiation of the whole contract, or whether it gives rise only to a claim for compensation, and not to a right to treat the whole contract as repudiated. Thus, in the case of such a contract, as a general rule the seller must deliver instalments according to the contract and the buyer accept and pay for them[1], but in the case of a failure by either party to fulfil his obligations in respect of one instalment, "the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract," or the breach may occur in such circumstances, or be of such a nature, as to amount to a repudiation of the contract entitling the other qarty to put an end to it pursuant to the provisions of section 39 of the Indian Contract Act.

Sub-section (2) of section 38 apparently applies to cases where the contract is divisible but not absolutely independent of each other. It has no application to contracts which are entire or single though for the sake of convenience the performance may be effected by instalments. In such cases breach with regard to one instalment amounts to a breach of the contact.

Where goods are deliverable by instalments, and the price of each instalment is not payable separately, although it may be calculated with reference to separate portions of the goods, the buyer may reject any instalment delivered if the full quantity of the goods be not made up[2], but if he accepts any of the goods or deals with any of them as owner he must pay for them at the contract rate[3]. He is also bound to do so if he retains them beyond the time appointed for complete delivery or beyond a reasonable time where no time is fixed for complete delivery[4]. Where the price is payable only after full delivery, or where no time of payment is specified, which amounts to the same thing, a full delivery by the seller is a condition precedent to the payment of any part of the price[5] and if the buyer has not appropriated the goods so as to make him liable for the part delivered at the contract rate as above, the mere acceptance by him of an instalment is not a final acceptance of it[6], barring his right to treat the contract as repudiated if the seller fails to make the full delivery[7].

Failure to pay for an instalment

Where a quantity of goods is deliverable by instalments which are to be separately paid for, the buyer is bound to accept and pay for each instalment which is tendered in due course of performance[8].

1. See, for instance, Howell v. Evans (1926) 134 L. T. 570.
2. Oxendale v. Wetherell, 9 B. & C. 386; Colonial Insurance Co. v. Adelaide Ins. Co. 12 App. cas. 128 (138) P. C.
3. Nicholson v. Bradfield L. R. 1 Q. B. 620.
4. Oxendale v. Wetherell, supra; Waddington v. Oliver, 2 B. & P. 61.
5. See Chanter v. Leese, 5 M. & W. 698, Ex. Ch.
6. Per Alderson B in Hardman v. Bellhouse, 9 M. & W. 596 (600).
7. Halsbury, 1st Edn., vol. 25, p. 218, note (a); 2nd Edition vol. XXIX.
8. Brandt v. Lawrence, supra; Reuter v. Sala, supra; Howell v. Evans (1926), 134 L. T. 570.

But a mere refusal or failure by the buyer to pay for one or more instalments, unaccompanied by any other act, does not seem to amount to a repudiation of the contract by the buyer[1]. Mere request for extension of credit similarly does not seem to entitle the seller to rescind[2]. Even insolvency, by itself, does not entitle the seller to rescind[3], though he may refuse to deliver, unless he is paid for instalments already delivered, and receives cash for subsequent instalments[4].

As in other cases, all the circumstances will have to be considered in determining whether there has been a repudiation of contract and whether or not the buyer intends to carry out the contract further. In *Withers* v *Reynolds*[5] the defendant agreed to furnish the plaintiff with wheat straw, sufficient for his use as stable-keeper, from October 20, 1829, till June 24, 1830, at the rate of three loads in a fortnight, "at 33s. per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830." The plaintiff being in arrear for several loads, paid the defendant for all the loads except the last, saying: "You may bring your straw, but I will not pay you on delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you." It was held, that he had shown an intention to repudiate the contract, and that the seller might treat it as at an end. Here the plaintiff was bound to pay for each load on delivery, and as he had expressly said in effect that he would not pay on delivery, the defendant was not bound to continue the supply.

The buyer might be putting forward some ground in good faith for failing or refusing to pay and this will have to be taken into consideration for making any inference.

When does breach amount to repudiation ?

Though as a general rule breach with regard to a particular instalment does not amount to a repudiation of the contract, a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be an essential one, going to the root of the contract, amount to a repudiation of the whole bargain. "The rule of law" says Blackburn, "is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say, 'I am not going to perform my part of it when that which is at the root of the whole and the substantial consideration for my performance is defeated by your misconduct[6].'" In this case there was a contract

1 See Freeth v. Burr (1874) L. R. 9 C. P. 208; Mersey Steel & Iron Co. v. Naylor Benzon & Co. (1884) 9 App Cas. 434; Payzu Ltd. v. Saunders (1919) 2 K B. 581, C. A.; Steinberger v. Atkinson & Co. (1915) 31 T. L. R. 110; Sooltan Chand v. Schiller (1878) 4 Cal. 252; Simson v. Virayya (1886) 9 Mad 359; Sundar Singh v. Krishna Mills Co. 63 P. R 1914; Ramdeo v. Cassim Mamoojee (1893) 21 Cal. 173.

2 In re Phoenix Bessemer Steel Co. (1876) 4 Ch. Div. 108, C. A.; Rash Behary Shaha v. Nittaya Gopal Nundy (1906) 33 Cal. 477.

3 Cf. section 54 and notes thereunder.

4 See section 47 and notes thereunder.

5 (1831) 2 B. & Ad. 882, 36 R. R. 782; cf. Burn & Co. v. Morvi State A. I. R. 1925 P. C. 188=30 Cal. W. N. 145=90 I. C. 52.

6 Mersey Steel & Co. v. Naylor & Co. (1884), 9 App Cas. 434, at p. 443; Munro & Co. v Meyer, (1930) 2 K. B. 312, at p. 332 ("each delivery to be treated as a separate contract and failure to give or take delivery shall not cancel the contract as to future deliveries").

for the sale of 5000 tons of steel. to be delivered 1000 tons monthly. commencing from January. 1881, payment within three days after receipt of shipping documents. It was held that payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the postponement of payment for the goods delivered under a *bona fide* mistake (*viz.* asking the seller to obtain an order from court before payment could be made as an application for winding up was pending against the seller) did not indicate an intention to repudiate the contract so as to release the sellers from further performance. But in *Ebbw Vale Steel Co.* v. *Blaine Ins. Co.*[1] where the contract expressly provided that the payment for each instalment should be made on due date as a condition precedent to further deliveries, it was held that non-payment of one instalment justified refusal to make any further deliveries. In *Payzu Ltd* v. *Saunders*[2] failure to make punctual payment for the first instalment was held not to amount to a repudiation of the contract, nor did it go to the root of the contract. In *Rash Behary* v. *Nrittya*[3] there were two contracts. It was held that failure to take delivery under the first contract did not justify tho seller in rescinding the second contract.

Where the seller continued to deliver after default by buyer to pay and then repudiated the contract, it was held that there was acquiescence on the part of the seller in the continuance of the contract and he could not repudiate[4]. In *Freeth* v. *Burr*[5], the defendant contracted to sell to the plaintiffs 250 tons of pig iron, half to be delivered in two, remainder in four weeks, payment net cash fourteen days after delivery of each parcel. The delivery of the first parcel of 125 tons was not completed for nearly six months, in spite of repeated demands by the plaintiffs. The plaintiffs thereupon refused to pay for it, erroneously claiming to set off the debt against any possible liability of the defendant; but they still urged delivery of the second parcel. The defendant treated the refusal to pay as an abandonment of the contract, and declined to deliver any more. The price of the first parcel was ultimately paid, and it was not suggested that the plaintiffs were unable to pay. The plaintiffs sued for the non-delivery of the second parcel.

Held, that the refusal to pay was not, under the circumstances, sufficient to justify the defendant in treating the contract as abandoned by the plaintiffs, and he was liable for non-delivery of the second instalment.

Coleridge C. J., said :

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an *intention to abandon* and altogether *to refuse performance* of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest.........I think it may be taken that the fair result of them is as I have stated........ Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

1 (1901) 6 Com. cas. 33.
2 (1919) 2 K. B. 581.
3 (1906) 33 Cal. 477.
4 Sundar Singh v. Krishna Mills Co. 63 P. R. 1914=23 I. C. 91.
5 L. R. 9 C. P. 208 ; 43 L. J. C. P. 91.

In *Maples Flock Co.* v. *Universal Furniture Products*[1], the Court of Appeal in applying the sub-section laid down two tests, *viz*, (*i*) the quantitative ratio which the breach bears to the contract as a whole and (*ii*) the degree of probability that such a breach will be repeated. Therefore, it is always a question depending on the contract and the circumstances of the case whether the breach of contract is a virtual repudiation of the contract *in toto* or a severable breach of a part only such as to give rise to a claim for compensation[2].

On the question whether a partial breach is a repudiation, the principle stated by Lord Coleridge in *Freeth* v. *Burr* was accepted as the true test and Lord Selborne observed[3]:

> "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its further performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

In *Dominion Coal Co.* v. *Dominion Iron Steel Co.*,[4] the coal company agreed to supply the steel company with " all the coal the steel company might require for use in its work," and all the coal supplied "should be freshly mined and of the grade known as run-of-mine, reasonably free from stone and shale." After the contract had been carried out for some time, the steel company then requiring 80,000 tons a month, 153 car-loads were rejected as not according to contract, the steel company writing to the coal company that "the coal contained an undue percentage of shale and slate and sulphur, and was unsuitable for their requirements and was not in accordance with the contract," and the coal company was notified that all coal delivered must be fresh mined run-of-mine coal suitable for the steel company's purposes. To which the coal company replied: "Your conduct in refusing to accept delivery of coal furnished and to be furnished constitutes a clear repudiation on your part of your obligations under the contract, and renders further performance on our part impossible. We, therefore, formally notify you that the contract mentioned is at an end."

Held, that the coal delivered was not according to contract and was rightly rejected, and that the coal company was not entitled to repudiate the contract, but that the steel company were entitled to repudiate it. Here the buyers committed no breach, and therefore the seller's repudiation was wrongful.

In the case of a contract for the sale of goods to be delivered in stated instalments, in the absence of anything to the contrary in the contract, the tests to be applied in deciding the question whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation. but not to a right to treat the whole contract as repudiated, are firstly, the quantitative ratio which the breach bears to the con-

1 (1934) 1 K. B. 148.
2 Taylor v. Oakes, (1922) 127 L. T. 267; (cf.) Munro, v. Meyer, (1930) 2 K. B. 312.
3 9 A. C., at 438; 58 L. J. Q. B. 497.
4 (1909) A. C. 293; 78 L. J. P. C. 115 (P. C.).

tract as a whole, and secondly, the degree of probability that such a breach will be repeated.[1]

In *Khettra Mohan Dey* v. *Benode Behary*[2] the contract was held to be a single contract for 300 tons with a subsidiary agreement that deliveries were to be made and paid for by two monthly instalments; the buyer failed with regard to the first instalment which covered no less than one-half at the outset of the contract. Held, it would be putting upon the defendant a different contract if he were allowed to insist upon delivery of the second half.

In *Volkart Bros.* v. *Rutnavelu*[3] "shipment at monthly intervals" was construed to mean at intervals of one month more or less regard being had to the time which it might be reasonable to allow to the seller for finding a steamer available for the required shipment.

Where the stipulation as to the quantity of goods deliverable by stated instalments is qualified by the use of some such words as about or 'more or less' the question whether the qualifying words applies to the whole quantity sold or to the amount of each instalment is a question, solution of which depends on the construction of the contract itself.[4]

In *Ratilal J. Kothari* v. *Lakhmichand Srinivas*[5] parties to a contract agreed to deliver and take 1500 bags of corn in three instalments of 500 bags each When the first instalment was defaulted, a suit was filed in respect of that instalment; when the second instalment was defaulted, similar action was taken. In respect of the third instalment when a suit was filed, it was contended that the cause of action for the second and third suits was the same and hence the third suit was barred by Order 2, Rule 2, Civil Procedure Code. *Held*, that looking to the terms of the contract, the intention of the parties and the circumstance in that objection on similar grounds was not taken in the second suit, the causes of action for default of each instalment were separate and that the suit was not barred.

It may be observed that the rule in English law was originally very strict as is clear from *Withers* v. *Reynolds*. In *Hoare* v. *Rennie*[6] and *Honck* v. *Muller*[7] it was held in similar circumstances that a failure to deliver or pay for a particular instalment was a breach which went to the root of the contract. But the rigidity of the above view was relaxed subsequently, as we have already seen, so that a mere failure to pay for, or deliver one instalment will not discharge the seller or buyer from his obligations, unless it amounts to repudiation and reasonably leads to the inference that similar breaches will be committed in regard to subsequent deliveries[8].

1 Chunni Lal Mansa Ram v. Sheo Prashad Banarsi Das, 1943 All. 370= 210 I. C. 55=I. L. R. (1943) All. 752.
2 (1929) 34 C. W. N. 33.
3 (1892) 18 Mad. 63.
4 Societ) Anonymus L' Industrialee Russo-Belge v. Scholefield, 7 Com. cas. 114 C. A.
5 A. I. R. 1938 Rang. 364.
6 (1859) 157 E. R. 1083 ; 120 R. R. 458 : sale of 2000 tons ; "the thing bargained for being the whole quantity of iron and no less". 1st instalment consisting of two-third of the total refused by the buyer. The buyer held barred to ask for other instalments.
7 (1881) 7 Q B. D. 92: equal instalments but the first one much smaller than was provided for. Buyer refused to accept the same. Buyer could repudiate the whole contract.
8 See also Millar's Karri Co. v Weddel (1909) 100 L. T. 128 ; Bloomer v. Bernstein, (1874) 9 C. P. 588.

Effect of breach which amounts to repudiation.

Where the breach in fact amounts to a repudiation, the other party may, as provided by section 60, accept the repudiation and rescind, and bring his action for damages: and the party in default cannot rely on the fact that all conditions precedent have not been performed, for instance, that no further goods were tendered by the seller[1]. He cannot also assert that if he had not repudiated, the other party would not have been in a position to carry out his contract. In *Taylor* v. *Oakes*[2] there was a contract for the sale of hatter's fur, deliverable by instalments. The buyers accepted an instalment, though owing to some defects in the fur they might, if they had discovered the defects, have rejcted it. Afterwards, for reasons unconnected with the first instalment, they gave notice that they would not accept further deliveries, and no further deliveries were tendered by the sellers. *Held*, that the defective delivery was, in the circumstances, a severable breach which would not have entitled the buyers to rescind the contract and refuse to accept further deliveries, and their conduct was a wrongful repudiation of the contract. It was, therefore, no defence to the buyers to say that if they had not repudiated, the sellers would have tendered in the next delivery fur of the same kind as that which they had delivered in the first instalment, and the buyers would have been entitled to reject it.

In *Millar's Karri and Jarrah Co.* v. *Weddel*[3], on a contract for the sale of blue gum timber deliverable by two shipments, where the first instalment was not according to the contract it was held that "if a partial breach is of such a kind, or takes place in such circumstances, as reasonably to tend to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may then and there be regarded as repudiated, and may be rescinded," whether the breach be in payment by the buyer, or delivery by the seller. It was also pointed out that a repudiation may be inferred from acts, notwithstanding that the party committing the breach contended "that he was performing the contract, and might in fact be intending to perform the remainder of it. In that case there was a contract for the sale of 1100 pieces of timber to be delivered in two instalments, payments to be made against delivery of shipping documents The shipping documents in respect of both shipments arrived before the arrival of the goods and were duly taken up by the buyers. When the first instalment arrived the buyers examined the timber and found it to be of very inferior quality and refused to accept it and demanded the money back intimating their intention to refuse to take the second shipment upon the ground that the first shipment was such a departure from the contract as to justify a refusal to accept either instalment. It was held that from the circumstances an inference could be drawn that the second instalment would also be bad and the buyers were justified in repudiating the whole contract.

The existence of a clause which frequently occurs in such contracts, that each delivery or shipment shall be treated as a separate

1 Cort v. Ambergate Ry. Co. (1851) 17 Q. B. 127, 85 R. R. 369; Repley v. McClure (1850) 5 Ex. 140.

2 (1922) 127 L. T. 267, C. A.

3 (1909), 100 L. T. 128; 14 Com. Cas. 25.

contract, and the failure to give or take any delivery or shipment shall not cancel the contract as to future deliveries or shipments," will not suffice to deprive the other party of his right to rescind[1].

Breach in respect of one instalment discharges contract with respect to that instalment.

The effect of a breach by either party in making or taking delivery of an instalment is to discharge the contract to that extent, subject to the defaulting party's liability to pay damages. Its delivery cannot afterwards be enforced or demanded.[2]

Temporary suspension of deliveries.

Where, by agreement, deliveries are subject to be suspended in a specified event, they must be resumed within a reasonable time after the event has ceased to operate, unless the change of circumstance is such that, to treat the contract as subsisting, would be to force upon the parties a substantially different contract. In the latter event the contract is dissolved on both sides[3].

39. (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer. Delivery to carrier or wharfinger

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

1 Robert A. Munro & Co. v. Meyer (1930) 2 K. B. 312, at p. 332.

2 See Simpson v. Crippin (1872) L. R. 8 Q. B. 14 Compare Ireland v. Merryton Coal Co. (1894) 21 S. C. 989.

3 Benjamin on Sale, 7th Edn., p. 764; Metropolitan Water Board v. Dick, Kerr & Co., (1918) A. C. 119; 87 L. J. K. B. 370.

Delivery to wharfinger or carrier—analogus law.

This section is based on section 32 of the English Sale of Goods Act, 1893, and old section 91 of the Indian Contract Act, 1872 (See Appendices). With reference to it the Special Committee observed :

"This clause is a combination of section 32 of the English Act and section 91 of the Indian Act. In England it has been well settled for more than a century 'that if a tradesman orders goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser' (Pollock and Mulla's Contract Act citing *Dutton* v. *Solomonson* 3 B. & P. 582). It is also well established that it is the seller's duty 'to do whatever was necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them into such a course of conveyance, as that in the case of a loss the buyer might have his indemnity against the carriers' [*Clarke* v. *Hutchins* (1811) 14 East 475]. These two rules have been embodied in section 91 of the Indian Act and elaborated in section 32 of the English Act. Section 91 of the Indian Act refers to a carrier or a wharfinger also. The reason appears to be that delivery of goods to a carrier or wharfinger was treated as standing on the same footing [*Buckman* v. *Levi* (1813) 3 Camp. 414]. The English section does not refer to a wharfinger. In England there are special statutory provisions relating to wharfingers. As the rule as to wharfingers in section 92 has been in existence since 1872 in India, we consider it desirable to include it in the present clause."

Effect of delivery to wharfinger or carrier—sub-section (1).

This sub-section lays down that where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, *for the purpose of transmission to the buyer*, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer. It does not apply where there is no contract of sale at the time of delivery, for instance, where goods are delivered to a carrier for transmission to a person on approval or on sale or return[1].

The effect of the section is to make the carrier or wharfinger *prima facie* the agent of the buyer to take delivery[2]; but the carrier or wharfinger is not the buyer's agent to accept the goods[3]. As has already been noticed[4], delivery of the goods to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal, amounts to an unconditional appropriation of the goods to the contract.

The presumption created by this sub-section is, however, rebuttable. Thus, the seller may reserve the right of disposal[5], as by taking a bill of lading to his own or a third person's order, in which case the delivery is not to the buyer, but to the person indicated by the bill of lading[6]. So also if the seller should sell goods undertaking to make the delivery himself at a place other than

1 Cf. Swain v. Shepherd (1832) 1 Mood. & R. 223 ; 42 R. R. 782.

2 Cf. Vale v. Bayle (1775) 1 Cowp. 294 ; Dawes v. Peek (1799) 8 Term Rep. 330 ; 4 R. R. 675 ; Dunlop v. Lambert (1838) 6 Cl. & Fin. 600, 620 ; 49 R. R 148, 157 ; Wait v. Baker (1848) 2 Exch. 1, at p, 7 ; 76 R. R. 469, 474.

3 Hanson v. Armitage (1822) 5 B. & Ald. 557 ; 24 R. R. 478 ; Meredith v. Meigh (1853) 2 E. & B. 364 ; 95 R. R. 608 ; see also judgment of Blackburn J. in Calcutta Co. v. De Mattos, (1863) 139 R. R. 752 ; 32 L. J Q. B. 328.

4 See section 23 (2) ante.

5 Section 25 (1) ante.

6 Per Cleasby B, in Gabarron v. Kreeft (1875), L. R. 10 Ex. 274, at 285 ; 44 L. J Ex. 238 ; see also Wait v. Baker (1848), 2 Ex. 1, at 7, 8 ; 17 L. J. Ex, 307 ; 76 R, R. 469.

that where they are when sold, thus assuming tne risks of carriage, the carrier is the seller's agent[1], but "the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods *necessarily* incident to the course of transit[2]." Again, while goods are in the hands of a carrier as such, they are liable to be stopped in transit[3]. The parties can well make their own arrangements as to the terms on which the goods are to be deliverd as the rule stated above apply in the absence of any contract to the contrary[4].

The words in this sub-section "whether named by the buyer or not" should be read subject to the preceding words, "in pursuance of the contract," so that if the buyer names a particular carrier the seller must deliver to him, otherwise there will be no proper delivery[5]. If the buyer has given any express instructions to the seller with regard to the mode of transmission, consistent with the terms of the contract, it is the seller's duty to carry them out ; and if he fails to do so, the goods remain at his risk during the transit[6]. If the instructions are properly carried out, the risk is with the buyer[7]. "It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance ; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.[8]"

Even where the seller delivers to the wrong carrier it is apprehended that the buyer may, by his negligence, be compelled to treat the delivery as valid, *e.g.* where he makes an unreasonable delay in notifying to the seller the non-arrival of the goods by the carrier named[9]. In *Cooke* v. *Ludlow*[10] the buyer living near Bristol ordered goods of the seller to be sent from London by any conveyance for Bristol. The seller sent the goods to a wharf where he was informed that they would be conveyed to Bristol by the ship "commerce" and accordingly notified the buyer that they would be sent by that ship. That ship, however, was fully laden and, unknown to the seller, the goods were sent by another ship and were subsequently lost. The buyer was held liable to pay the price of the goods.

The rule laid down in this sub-section is, however, a *prima facie* rule and may be modified by express contract[11].

Seller's duty on delivering goods to a carrier—sub-section (2).

1 Dunlop v. Lambert (1838), 6 Cl. & F. 600 ; 49 R. R. 143 (H. L.).
2 See section 40 post.
3 See sections 50 and 51 of the Act.
4 See Alagappa Chetty & Co. v. Roop Chand (1929) 57 M. L. J. 110.
5 Vale v Bayle (1775) ; Cowp. 294.
6 Ullock v. Reddelein (1828), Dans. & Lloyd 6 ; 5 L. J. (O. S.) K. B. 208.
7 Vale v. Bayle, supra.
8 Dunlop v. Lambert (1838) 6 Cl. & Fin. 600 at p. 620 ; 49 R. R. 143, 157.
9 Cooke v. Ludlow (1806), 2 B. & P. N. R. 119 ; See Benjamin on Sale, 7th Edn., p. 778.
10 Supra.
11 See Dunlop v. Lambert, supra ; Calcutta Co. v. De Mattos (1863) 32 L. J. Q. B. 322, at 328 ; Sadasook Kothari v. Chaitram, A. I. R. 1926 Cal. 218=88 I. C. 910.

"Delivery of goods to a carrier or wharfinger," says Lord Ellenborough, "with due care and diligence is sufficient to charge the purchaser, but he has a right to require that in making this delivery, due care and diligence shall be exercised by the seller[1]." By this sub-section the seller is bound, when delivering to a carrier, to take the usual precautions for ensuing safe delivery to the buyer, so that in case of default by the carrier the buyer may have his remedy against the carrier The seller is not bound to provide against every contingency : his contract with the carrier must be a reasonable one having agreed to the nature of the goods and the circumstances of the case.

In *Clarke* v. *Hutchins*[2] the seller, in delivering goods to a trading vessel, neglected to apprise the carriers that the value of the goods exceeded £5, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost and in the seller's action for goods sold and delivered it was held that the seller had not made a delivery of the goods, not having "put them into such a course of conveyance as that, in case of loss, the defendant might have his idemnity against carriers." In *Venkatachalam* v. *Iyengar*[3] commission agent was not held liable for despatching goods uninsured which was customary.

A seller cannot claim a decree against the buyer unless he can establish that he has placod him *i.e.* the consignee of the goods in a position to claim delivery thereof from the carrier. A delivery to the carrier would be tantamount to a delivery to the purchaser only if this is done The mere delivery to a carrier without taking a receipt from him and without intimating his name to the consignee or without sending the receipt taken from the carrier to the consignee will not entitle the seller to claim the price of the goods from the puchaser. It is only on proof of these two matters in addition to the delivery of the goods to the carrier that the seller can claim a decree against the buyer. This will not be the case if the carrier be the nominee of the purchaser in which case the mere proof of delivery of the goods to such a carrier would entitle the seller to claim the price of the goods from the purchaser[4].

In a case under the old corresponding section 91 of the Indian Contract Act, it was held that where the contract provides that goods shall be sent at "owner's risk," the property passed to the buyer on delivery to the carrier[5].

As the seller's duty under this sub-sectien is only to act reasonably in the circumstances to provide against loss or damage in transit, it is conceived that he is under no liability to enter into such a contract with the carrier as will insure an indemnity to the buyer in all events as *e.g.*, against loss or damage by the act of God, or other perils excepted in the case of carriers[6].

1 Buckman v. Levi (1813), 3 Camp. 414.
2 14 East 475 ; 13 R. R. 283.
3 47 M. L. T. 312.
4 Firm Narain Singh-Tehl Singh v. Firm Tulsi Ram-Suraj Prakash, A. I. R. 1937 Lah. 785.
5 Alagappa v. Roopchand, A. I. R. 1929 Mad. 685=117 I. C. 136=(1929) 57 Mad. L. J. 110.
6 See Halsbury Laws of England 2nd Edn. Vol. XXIX, pp. 139, 140, n. p.

Liabilities of carriers.

In India in certain cases, the liabilities of carriers have been limited by special legislation The more important of these are —

Section 3 of the Carriers Act, 1865, which is as follows —

"No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in one value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof"

"Common carrier" is defined by section 2 of that Act as denoting a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all person indiscriminately

Sections 72 and 73 of the Indian Railways Act, IX of 1890, which are to the following effect —

'72 (1) The responsibility of a railway administration for the loss destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall subject to the other provisions of this Act be that of a bailee under sections 151, 152 and 161 of the India Contract Act 1872

(2) An agreement purporting to limit that responsibility shall, in so far as purports to effect such limitation be void, unless it—

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Governor General in Council

(3) Nothing in the common law of England or in the Carriers Act, 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility as in this section defined of a railway administration

73 (1) The responsibility of a railway administration under the last foregoing section for the loss, destruction or deterioration of animals delivered to the administration to be carried on a railway shall not in any case exceed in the case of elephants or horses, five hundred rupees a head or, in the case of mules camels or horned cattle, fifty rupees a head or in the case of donkeys sheep goats, dogs or other animals ten rupees a head, unless the person sending or delivering them to the administration caused them to be declared or declared them at the time of their delivery for carriage by railway to be respectively of higher value than five hundred, fifty or ten rupees a head, as the case may be

(2) Where such higher value has been declared the railway administration may charge, in respect of the increased risk a percentage upon the excess of the value so declared over the respective sums aforesaid

(3) In every proceeding against a railway administration for the recovery of compensation for the loss, destruction or deterioration of any animal, and, where the animal has been injured, the extent of the injury shall lie upon the person claiming compensation"

Sea transit—sub-section (3)

As regards transit by sea, sub-section (3) lays down that in the absence of any agreement to the contrary, where goods are sent by the seller to the buyer by a route involving sea transit, *in circumstances in which it is usual to insure*, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

The rule contained in this sub-section and the corresponding provision of the English Act is borrowed from the Scottish law. Mr. Bell, summing up the Scotch cases, says : "In delivering goods on ship-board, the seller is bound not only to charge the ship-master or shipping company with them effectually, but though not bound to insure, he must give such notice as to enable the buyer to insure[1]." Where goods are forwarded by sea by an agent to his principal, it seems to be the duty of the agent to insure, in the absence of any agreement or course of dealing[2].

The rule contained in this sub-section is very general and its exact scope is not very clear. It obviously does not apply to a c.i.f. contract (as in such a contract the seller is bound to insure), under which it is the obligation of the seller to effect the insurance, nor to an ex-ship contract, as in that case the buyer has no insurable interest in the goods while at sea[3]. The question whether it applies to f.o.b. contract also came for consideration in *Wimble* v. *Rosenberg*[4]. In that case the contract was for 200 bags of Aracan rice, f.o.b. Antwerp, to be shipped as required by buyers, cash against bill of lading." On August 9 the buyers instructed the sellers to ship to Odessa. The goods were shipped on August 24, the ship sailed on the 25th, and was lost on the 26th. On the 29th the bill of lading was presented, which was the first intimation of the shipment the buyers received. In an action for the price, the buyers set up the term of section 32 (3) of the English Act, having received no notice to insure. *Held*, by Bailhache, J., that in any ordinary f.o.b. contract, which he held the contract to be, that is to say, where shipment is to be made on a ship nominated by the buyer, no notice to insure is necessary, as in his opinion, in such a contract the seller is not "authorised or required to send" the goods to the buyer. The seller performs his duty where he puts the goods on board.

On appeal the Court of Appeal were divided in opinion : Vaughan Williams, L. J. holding that the sub-section applied and the sellers had not given such notice as to enable the buyers to insure ; Buckley L. J., that the sub-section applied, but the buyers had sufficient information to enable them to insure, so there was no obligation on the sellers to give notice ; and in any case the contract itself was sufficient notice : Hamilton, L. J. that the sub-section did not apply to a f.o.b. contract and if it did the contract itself gave sufficient notice.

In *Northern Steel Co.*, v. *Balt*[5], the decision of the majority in the preceding case that section 32 (3) of the English Act covers f.o.b. contracts, was, with doubt, followed and on the facts of the case it was held that there had been no failure on the part of the sellers. On August 26 they had informed the buyers of the sailing of the ship on the 24th, and the buyers knew this fact on September 6, twelve days before the loss of the goods. At the date they knew

Law of Sale, p. 89 ; See also Brown's Sale of Goods Act, 1893, pp. 161—164; Wimble v. Rosenberg (1913) 3 K. B. 748, C.A.

2 Smith v. Lascelles (1788) 2 Term R. 187 ; 1 R. R. 457.

3 See Wimble v. Rosenberg, supra.

4 (1913) 1 K. B. 279, (1913) 3 K. B. 743, C. A.

5 (1917) 33 T. L. R. 516 (C. A.).

all facts material to insurance and the evidence showed they could have insured.

The usual contracts of sale which involve the carriage of goods by sea are three, namely c.i.f., f.o.b. and ex-ship, and for the incidents of these contracts see Appendix.

Contract to the contrary

As already observed, it is open to the parties to enter into a contract to the contrary and by usage a term may be inferred authorising the seller to send goods at buyer's risk uninsured[1].

Risk where goods are delivered at a distant place

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Risk where goods are delivered at a distant place.

This section is based on section 33 of the English Act, which is practically the same as this section, There was no corresponding provision in the Indian Contract Act.

Alderson, B. observed in *Bull* v. *Robinson*[2] :

> "A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration ; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other, or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission."

In this case hoof iron was despatched in a clean and bright condition from the seller's premises but became rusted at the destination ; it was held that the rusting was a necessary incident of transit.

Where the seller undertakes to deliver the goods at some distant place at his own risk, the risk of transit is by this rule, distributed between the seller and the buyer. As the seller undertakes only extraordinary risk of loss or deterioration as is not incidental to the ordinary course of transit or is not contemplated or is not capable of contemplation by the parties at the time of the contract, the risk of ordinary deterioration of the goods due to transit which is always in contemplation of the parties who are aware of the nature of the goods and of the ordinary incidents of transmission is not covered by such undertaking unless the seller specially undertakes to bear such risk also. The reason of the rule is apparent. Where the goods are transmitted by the buyer or the seller they must naturally undergo such deterioration during transmission as is incidental to their nature and ordinary circumstances attending such transmission. The seller by mere uudertaking to deliver the goods at a distant place takes the risk of accidents but not of such incidental deterioration which no precaution on his part can prevent and which being the

1 Alagappa v. Roopchand, A. I. R. 1929 Mad. 685=57 M. L. J. 110=117 I. C. 186.

2 (1854) 10 Ex. 342, at p. 346, 102 R. R. 620.

effect of time and wear and tear of voyage must befall the goods in any event whether they were transmitted by the buyer or the seller. The buyer, therefore, is not entitled by this rule to refuse to accept to delivery on the ground of their deterioration during transit if the deterioration is such as would have naturally resulted even if he himself would have transmitted them i.e. which is the natural result of the time which was spent during transit and of the wear and tear of carriage. The seller must, however., bear the risk of any extraordinary or unusual deterioration during transit.[1]

The rule contained in the section is not confined to the case of a manufacturer[2] : it is, however, limited by the rule that perishable goods which are consigned to a distant place are not merchantable unless they are in a condition to remain saleable for a reasonable time[3] ; or in other words in the case of perishable goods, the seller must be deemed to warrant that the goods will be in a merchantable condition for a reasonable time after the transit. In this case the buyer was held entitled to reject rabbits which arrived in Brighton in an unsaleable condition, though they were saleable when sent off from London and were sent in the ordinary course and nothing unusual happened in the course of the transit.

Under section 26 *ante* the goods remain at the seller's risk until the property therein is transferred to the buyer, and the risk *prima facie* passes with the property. The present section therefore, must be taken as applying only to cases where the property has passed to the buyer before delivery.

In accordance with section 62, the rule laid down in this section may be overridden not only by express agreement, but by usage or course of dealing between the parties also.

It may be noted that whether the phrase "at the seller's risk" applies to all risks or only to *unusual* risks depends upon the facts of the particular case.

Buyer's right of examining the goods

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of exami-

Bull v. Robinson, supra ; Walker & Longdale's Chemical Manure Co., 11 Macph. 806.

See Chalmers, Sale of Goods Act, 11th Edn., p. 103 : Winnipeg Fish Co. v. Whitman Fish Co. (1909). 41 Can. S.C.R. 45 : sale of fish which was held to be deteriorated from some unusual and exceptional cause the risk of which was on the seller.

Beer v. Walker (1877) 46 L.J.C.P. 677, 37 L.T. 278 ; cf. Ollett v. Jordan (1918) 2 K.B. 41, at p. 47. See also Burrows v. Smith (1894) 10 T. L. R. 246.

ning the goods for the purpose of ascertaining whether they are in conformity with the contract.

Buyer's right of examining the goods.

This section reproduces section 34 of the English Act. Sub-section (1) enacts the well established proposition that no acceptance can properly be said to have taken place until the buyer has had an opportunity of rejection. "Suppose," says Lord Bramwell, "I order a certain quantity of lime to be taken to a farm, and I am not there to object, and no body else is there to object to it, I shall not be at liberty afterwards to say : 'Those goods have not been accepted and received by me ; they have been, as much as it was possible, unless I had chosen to be there to make objection. So, on the other hand, if I go to a shop for an article I have previously ordered, and it is delivered to me wrapped up. though I cannot see what it is, there cannot be the slightest question that I have received and accepted the goods, if they turn out to be in conformity with the order ; yet no body can say that I shall not have a right to object to them afterwards, if they are not in conformity with the contract.[1]"

The rule stated in sub-section (2) is a corollary to the above rule and was applied in *Isherwood* v. *Whitmore*[2]. In that case, the defendants, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods were shown two closed casks said to contain them. It was held that no sufficient opportunity was given to the buyer to examine the goods and the plaintiff, therefore, had not made a valid offer of delivery.

While sub-section (1) applies only to cases where delivery has already been made, sub-section (2) applies where delivery is incomplete in the sense that it is only being tendered.

Sub-section (1)—buyer has right to inspect before acceptance.

When goods are delivered to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing, and acceptance another. The buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. This is the rule laid down in sub-section (1). "No acceptance can be properly said to take place before the purchaser has had an opportunity of rejection" and "a right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right[3]."

Thus the effect of sub-section (1) is that in cases where there has been no previous examination of the goods, "the mere fact that

1 Castle v. Sworder (1860), 5 H. & N. 281. See S. C. 29 L. J. Ex., at p. 312, Ex. ch.

2 11 M. & W. 347.

3 Per Willes J. in Bog Lead Mining Co. v. Montague, (1861), 10 C. B. (N. S.) 481; 128 R. R. 797.

the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract.[1]"

Under section 17 (2), where goods are sold by sample, it is a condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and if it is not given him, he may rescind the contract.

Hidden defects in the goods

In *Heilbutt* v. *Hickson*[2], the plaintiffs, merchants in London, contracted on behalf of correspondents at Lille in France, with the defendants, manufacturers of shoes, for the purchase of 30,000 pairs of black army shoes, *as per sample*, to be delivered free at a wharf in weekly quantities; *to be inspected and quantity approved before shipment*; payment in cash on each delivery. The plaintiffs appointed a skilled person to inspect the shoes and a number were rejected and a large number inspected and approved. Before the first delivery, even one shoe, was cut open at the asking of the plaintiff's agent but there was no paper found in the sale. The plaintiffs accordingly accepted and paid for 4,950 pairs, which were shipped to Lille, where they arrived. When the French authorities examined the samples at Lille, they discovered that in many cases they contained paper and the French authorities accordingly rejected all the boots. It was held that the buyers had not accepted the boots and were entitled to recover the money which they had paid for them. The argument followed was that the boots contained paper in the soles, a defect which rendered them unless for military purposes but could not be disclosed by any examination which was practicable at the wharf in London.

The buyer of a parcel of wheat by sample has a right to inspect the whole in bulk at any proper and convenient time, and can rescind the contract if the seller refuses it[3] It has also been held that to determine inferiority in quality it is not necessary to examine the entire bulk; an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose.[4]

In *Khan* v. *Duche*[5] where the defect was by mistake not discovered on inspection, it was held that the buyer could sue for damage. In *Sanders* v. *Jameson*[6] a custom of Liverpool corn market, *viz*, when corn is sold by sample, if the buyer does not on the day the corn is sold, examine the bulk and reject, he cannot reject it afterwards or refuse to pay the whole price, was held to be reasonable.

In *Pettitt* v. *Mitchell*[7] there was sale of goods at an auction. The goods were open to inspection for two days before the sale and by the printed conditions of the sale the buyer was to pay a deposit and remove the goods with all faults, imperfections or errors by a specified date and to pay the balance of the purchase price before taking them away. It was held that buyer was not entitled to examine the goods before paying the balance of the price.

1 Hardy & Co. v. Hillerns & Fowler (1923) 1 K.B. 658, at p. 663, per Greer J., affirmed (1923) 2 K. B. 490 at p. 495.
2 (1872) L. R. 7 C. P. 438 ; 41 L. J. C. P. 228.
3 Lorymer v. Smith (1822) 1 B. & C. 1.
4 Boisogomoff v. Nahapiet Jute Co., (1902) 29 Cal. 313.
5 (1905) 10 Com. cas. 87.
6 (1848) 2 C. & K. 557.
7 (1842) 4 Man. & G. 819.

Sub-section (2)—seller must give buyer opportunity of examining goods.

Sub-section (2) lays down that in the absence of an agreement to the contrary when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. Thus the seller cannot, unless there is an agreement to the contrary, claim that his tender of delivery is a performance of the contract on his part so as to enable him to sue the buyer for the price or for damages for non-acceptance, if he has not made it in such circumstances that the buyer has had a reasonable opportunity of examining the goods in order to ascertain whether the thing tendered really was what it purported to be[1]. It may be noted that this is but an instance of the general rule laid down by section 38 of the Indian Contract Act, and sub-section (2) is only another way of expressing it.

The Act contemplates only reasonable opportunity of examining ; it is the buyer's business to verify not the seller's to supply further proof that the goods are according to contract. Moreover, the goods need not be in the seller's actual possession ; control is enough[2]. The buyer is not entitled to continue inspecting and examining the goods until the expiration of the period for delivery. There must be some limit to the buyer's right to inspect, and a reasonable opportunity is the limit alike for vendor and purchaser[3]. In *Thornett* v. *Beers*[4] the buyer was given every facility to examine and in fact went to the place to examine the goods but being pressed for time he did not have the barrels opened but merely looked at the outside of the barrels. It was held that the buyer had examined the goods within the meaning of S. 14(2) of the English Act.

It follows that the tender must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do[5]. A tender made at such a late hour of the appointed day as to leave no time to the buyer to examine the goods is not a good tender[6]. Likewise, the buyer must ask for the inspection at a convenient time[7].

The right of examination may be waived by the buyer by express agreement, course of dealing or usage[8]. Thus where the goods are to be delivered at a particular place ; and there is nobody present on behalf of the buyer to examine them, he will be deemed to have waived his right of examining the goods[9].

Isherwood v. Whitmore, supra ; cf. Startup Macdonald (1843) 6 Man. & G. 593, at p. 610, 64 R. R. 810 (question of the reasonableness of the hour of delivery).

See Pollock and Mulla, Contract Act, 7th Edn., pp. 256 and 257 ; Arunachallam Chettiar v. Krishna Ayyar, A. I. R. 1925 Mad. 1168=90 I. C. 481. As to reasonable opportunity see Ruttonsey v. Jamnadas (1882) 6 Bom. 692.

3 Ruttonsey v. Jamnadas, supra.

4 (1919) 1 K. B. 486. See also Bragg v. Villanova (1923) 40 T. L. R. 124.

5 See section 38(2), Indian Contract Act.

6 Startup v. Macdonald (1843) 6 Man. & Gr. 593 ; 64 R. R. 810.

7 Lorymer v. Smith (1822) 1 B. & C. 1.

8 See section 62, post.

9 Castle v. Sworder, supra.

The right of inspection is excluded in a c.i.f. contract, where payment is to be made against the delivery of the shipping documents. The seller is under no obligation to afford the buyer an opportunity of examination before payment on tender of the documents, for delivery of the bill of lading is delivery of the goods themselves, and the seller's only obligation is to tender the bill within a reasonable time, and he is not bound to await the arrival of the ship or landing of the goods[1].

A waiver of examination does not deprive the buyer of his right to damages[2]. If the buyer does any act amounting to unequivocal acceptance, he cannot afterwards reject the goods[3].

The section requires there must be a request for inspection by the buyer.

Time and place of examination.

Prima facie the time and place of examination are the time and place of delivery[4]. If A agrees to deliver goods to B at Calcutta, the place of inspection is Calcutta, even though A knows B intends to ship them to New York, unless Calcutta is not suitable for inspection, having regard to the nature of the goods and the way in which they are packed[5]. This general rule may, however, be displaced by the circumstances of the case, as in the case where the original place of examination is changed by agreement[6], or in the case where effective examination is impossible at the place of delivery[7]. Where the goods contain a latent defect, not discoverable by ordinary diligence at the place of delivery, the buyer may, notwithstanding an examination of the goods at the place of delivery, on a subsequent inspection reject the goods, if they do not answer to the contract description[8]. In *Grimoldby* v. *Wells*[9] there was sale of tares by sample. The goods were sent part of the way in a cart belonging to the seller and then placed in a cart belonging to and sent by the buyer who stored them in his barn where he examined and rejected them. It was held that he was entitled to do so and that the place of inspection was not the place of delivery.

In order to postpone the place for inspection it is necessary that there should be the two elements ; the original vendor must know, either because he is told ; or by necessary inference, that the goods are going further on, and the place at which he delivers must either be unsuitable in itself, or the nature or packing of the goods must make inspections at that place unreasonable[10].

1 Clemens Horst Co. v. Biddell Bros, (1912) A. C. 18 ; 81 L. J. K. B. 42, cf. Polenghi Brothers v. Dried Milk Co (1904) 92 L. T. 64.
2 Khan v. Duche (1905) 10 Com. Cas. 87.
3 See section 42, post.
4 Perkins v. Bell (1893) 1 Q. B. 193, C. A. ; sale by sample, where the goods were to be delivered at the Railway Station. Nagardas v. Velmahomed. A. I. R. 1930 Bom. 249=126 I. C. 312 ; In re Andrew Yule & Co., A. I. R. 1932 Cal. 879=59 Cal. 928=140 I. C. 877.
5 In re Andrew Yule & Co. ; supra.
6 Heilbutt v. Hickson, supra ; See also Saunt v. Belcher & Gibbons (1920) 90 L J. K. B. 541 ; remarks of Greer J. in Hardy & Co. v. Hillerns (1923) 1 K.B. at p. 665,
7 Boks v. Rayner & Co. (1921) 37 T. L. R. 519, affirmed ib, 800, C. A. ; Scaliaris v. Ofverberg & Co. (1921) 37 T. L. R. 307, C. A. ; Bragg v. Villanova.
8 Heilbutt v. Hickson, supra ; Grimoldby v. Wells (1875) L. R. 10 C. P. 391.
9 (1875) L. R. 10 C. P. 391.
10 Saunt v. Belcher & Gibbons (1921) 90 L. J. K. B. 541.

The parties also may make such terms as they please as to the place and method of the examination.

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance

Acceptance.

Acceptance is something more than mere receipt or taking possession or delivery of the goods. It implies the final assent on the part of the buyer that he has taken the goods under and in performance of the contract of sale. There is no acceptance if the buyer refuses to assent whether rightfully or not though if he refuses to assent wrongfully he may be liable in an action for damage. The above rules indicate what acts and conduct of the buyer amount to acceptance.

Section 42 of the Act is based on section 35 of the English Sale of Goods Act, 1893. It provides that the buyer shall be deemed as having accepted the goods in the following cases *viz.*,

(1) when he informs the seller that he has accepted them[1] as he may do by actually selecting the goods, or directing delivery to be made to third parties[2]. Surely this is the most effective evidence of acceptance.

(2) When goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller, or in other words, when the buyer deals with the goods as if the seller has ceased to be their owner.

(3) Where the buyer retains the goods beyond a reasonable time without intimation of rejection, he is deemed to have accepted them. What is a reasonable time is a question of fact in each case.

The buyer is bound to accept the goods if they are in terms of the contract, and if he refuses to do so he will be liable for damages. But, as already noticed under S. 41 *ante*, the buyer is entitled to have a reasonable inspection of the goods (if he has not examined them before) to ascertain if they are in conformity with the contract. If there is a breach of a condition on the part of the seller the buyer is not bound to accept the goods. But the buyer in such a case may waive the breach of condition and accept the goods and may claim compensation for the breach.

Saunders v. Topp (1849) 4 Exch. 390; 80 R. R. 624; See Varley v. Whipp (1900) 1 Q. B. 513 (buyer complaining about the goods and returning them; held, no acceptance).

Cusack v. Robinson (1861) 1 B. & S. 299, 124 R. R. 566; Haridas v. Kalu Mull (1903) 30 Cal. 649.

Express acceptance.

This takes place when the buyer intimates to the seller that he has accepted the goods. In such cases no difficulty arises. Where the buyer having full opportunity of examining the sheep selected and ordered them to be delivered at his field, it was held that there was acceptance[1].

Acceptance implied from the acts or conduct of the buyer.

Acceptances may be implied from the acts or conduct of the buyer *e g.* acts of ownership or retention after a reasonable time.

Acts of ownership

These include any act in relation to the goods which is inconsistent or which indicates that the buyer is treating the goods as his own. It is a question of intention in each case but the intention is to be judged from their acts and conduct and not merely by the words they have used.

In *Hardy Hillerns*[2] (c. i. f. contract) there was a sale of wheat. The buyers without inspection resold and despatched part of the wheat to sub-buyers. Subsequently, after two days having discovered that the wheat was not in accordance with the contract, the buyers gave notice to the sellers that they rejected it and this notice was given within a reasonable time. The buyers, however, were held to have accepted the wheat and therefore the notice of rejection was ineffectual.

Goods being tendered by the seller the buyer took no steps to inspect the goods but by an endorsement on the delivery order directed the goods to be delivered to a third party to whom the buyer had sold the goods. The third party inspected the goods and ordered them to be delivered to his buyer who refused to accept. It was held that the buyer exercised a right of a proprietary character and so could not reject.[3]

In *Gan Kim* v. *Ralli Bros,*[4] there was sale of goods (Burma cutch) to be delivered in Calcutta by the vendors who knew that it was meant for the export market: delivery and acceptance followed upon a searching examination by the purchaser. In the course of the examination some goods were rejected. other cutch substituted, and extra allowance made for weight. The purchasers despatched the goods to their buyers in America under forward contracts. The buyers in America accepted part of the goods and rejected the rest as they were not of contract quality. Upon that the purchasers in Calcutta sued their sellers for breach of warranty. Held, the presumption of due performance that arose from such acceptance (after reaching examination) was not rebutted by sufficient cogent evidence, and so the seller was not liable.

1 See Sunders v. Topp (1849) 4 Exch. 390; Khoyee & Co. v. Gordon Woodroffe & Co., A.I.R. 1937 Mad. 40 = 166 I.C. 318 [Deliverv of skins-buyer putting them into work-held acceptance].

2 (1923) 2 K.B. 490.

3 Haridas v. Kalumull (1903) 30 Cal. 649.

4 (1886) 13 Cal. 237 P.C. See also Wallis v. Pratt (1911) A.C. 394 cited at p. ante.

In *Parker* v. *Palmer*[1] the buyer after he had seen fresh samples drawn from the bulk of rice bought by him, which were inferior in quality to the original sample offered the price for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample ; but it was held that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

Where the buyers claimed an allowance for inferiority and delivered the goods to their purchasers who refused to take delivery, it was held that the buyer could not reject the goods[2]. So also, delivery to sub-purchasers after notice of defect amounted to an acceptance.[3]

Resale by the buyer *ispso facto* does not amount to an act of ownership, but it may have that effect if the buyer resells after he had reasonable opportunity of examining them. See *Wallis* v. *Pratt* (cited at page ante) where the buyer evidently had no apportunity of examining the goods and resold them under the belief that they were in terms of the contract[4]. In *Chapman* v. *Morton*[5] the buyer rejected the good and gave notice to the seller that they were at the risk of the seller. The seller not taking any action the buyer sold the goods in his own name to a third person. Held, that under the circumstances the buyer had accepted the goods. It is not necessary to amount to acceptance that the buyer should actually examine the goods ; it would be enough if he had an opportunity to examine. If he takes no steps to examine he is deemed to have accepted.[6] *In Cunningham Ltd.* v. *Robert*[7] the mere fact of the buyer nominating a vessel and a sub-sale by him was held not to amount to acceptance.

As a general rule when the buyer exercises acts of ownership with regard to part of the goods he is deemed to accept the whole.[8] In *Harnor* v. *Groves*,[9] out of 25 sacks of flour which were found not according to contract, the buyer used two sacks, and sold half a sack. Held, he accepted the whole. In *Aitken* v. *Boullen*[10] (Scotch case) part of the twill supplied was according to sample and part was not. Held, the buyer could keep the whole claiming damage for the part not according to sample, but he could not keep a part and reject the rest.

But when deliveries are severable or to be made by instalments, the buyer by accepting the part or instalment delivered does not waive his right to reject the rest when tendered if not in terms of the contract[11]. Waiver of breach with regard to one or more instalments does not imply similar waiver in future ; but if the

1 4 B. & A. 387 : 23 R.R. 318. See also Parker v. Wallis (1855) 5 E. & B. 21.
2 Denaim & Co. v. Bebono 1924 A.C. 514.
3 Perkins v. Bell (1893) 1 Q.B. 193.
4 See also Molling v. Dean (1901) 18 T.L.R. 217.
5 (1843) 11 M. & W. 534.
6 See Haridas v. Kalumull, supra.
7 (1942) 28 Com. cas. 42, 48.
8 See Hardy v. Hillerns supra; Meehan v. Bow, (1910) 47 Sc. L.R. 650.
9 (1855) 5 C.B. 667.
10 (1908) 10 F. 490.
11 See Jackson v. Rotax Motor (1910) 2 K. B. 937; Mitchell v. Buldeo Das (1888) 15 Cal. 1.

buyer wants to insist on strict performance in future the seller must have a reasonable notice of the same.[1]

When the acceptance of the part is conditional, *e.g.* made on the ground that in future there will be no further breach, the buyer can return the part delivered if the seller commits breach with regard to subsequent deliveries. In *Lucy* v. *Mouflet*[2] the defendant, who had bought by sample a hogshead of cider on May 28, wrote to the plaintiff, the seller, that the cider was unsaleable, and that "should this continue he would be obliged to return. it" The seller did not reply till July 24, when he wrote demanding payment. At that time twenty gallons had been consumed. *Held*, that the seller had by his silence consented to a further trial, and that the defendant had not accepted the cider.

There was a sale of a quantity of coal briquettes of a specified size. They were loaded partly on deck and partly under deck, those on the deck being of the contract size. The master of the ship finding that the cargo was heating bought the deck cargo from the buyers. It was afterwards discovered that the briquettes loaded under deck were of a size larger than the specified size. The buyers thereupon gave notice rejecting the whole cargo and not (as they might have done) the underdeck part only. As they had accepted part of the cargo this notice was ineffectual.

It is thus clear that in order that an act may amount to acceptance it must fulfil the following conditions: Firstly, it should have been done after delivery of the goods to the buyer and secondly that it should be inconsistent with the ownership of the seller. An act done before delivery of the goods does not amount to acceptance even if it is inconsistent with the ownership of the seller. The buyer must have an opportunity to reject or accept before he can be bound down to his acceptance by his conduct. He must be given a chance of election which arises only when the goods are delivered to him and he has an opportunity to examine them and not before. A resale is an acceptance only when it takes place after an opportunity of rejecting so as to amount to an election to accept the goods. Where the buyer resells before such an opportunity there is no acceptance, unless it is impossible to return the goods. But where the buyer had had such opportunity but does not avail it and resells the goods, both the conditions are satisfied and he has no right to reject the goods when they are rejected by the sub-buyer in as much as the act of resale being inconsistent with the ownership of the seller the buyer shall be deemed to have accepted the goods.

Acceptance implied from retaining the goods after the lapse of a reasonable time, without intimating to the seller their rejection.

When after delivery and after the lapse of a reasonable time the buyer retains the goods delivered without intimating the seller that he has rejected them law will imply acceptance on his behalf[3].

1. Panoutsos v. Raymond; etc. (1917) 1 K.B. 767; Cunningham Ltd. v. Robert. (1922) 28 Com. cas. 42.
2. (1860) 5 H. & N. 229. See also Elliot v. Thomas (1838) 3 M. & W. 170.
3. Morrison v. Clarkson, 25 R. 427.

What is a reasonable time is a question of fact in each case.[1] The parties may by the contract limit the time within which the buyer must determine whether to accept or reject the goods and if after the expiration of such a limit, or if no time be fixed, a reasonable time, he does not reject, he is deemed to have accepted them.[2] The notice of rejection, however, must be a valid notice to make it effectual.[3]

After what is *prima facie* an unreasonable delay in rejection the burden is on the buyer to show that it is reasonable as, for instance, where he could not discover a breach of a condition before[4]. The time for rejection after the discovery of breach of contract is not extended because the goods were warranted for a certain period[5].

To imply acceptance from the laches of the buyer in intimating their rejection the following three conditions must be satisfied :

(1) Lapse of a reasonable time after delivery.

(2) Retention of goods by the buyer ; and

(3) No intimation to the seller that he has rejected them,[6]

The time may be expressly provided for by the contract,[7] or it may be implied by trade usage.[8] In determining what is a reasonable time, regard must be had to the seller's conduct, as where he has induced the buyer to prolong the trial of the goods, or has acquiesced in a further trial.[9] Where one party to a contract becomes aware of the breach of a condition precedent, he is entitled to a reasonable time to consider what he shall do.[10]

Acceptance may be conditional and on the condition being complied with, the acceptance may become absolute[11].

Where by arrangement between the parties to the contract, goods are to be accepted conditionally they can be rejected when the condition is broken[12] and the buyer is entitled to a reasonable time after the breach of the condition.[13]

In the case of a divisible contract acceptance of one instalment does not prevent rejection of others[14].

If the contract is not severable, the buyer cannot, except in cases provided for by section 37, reject part of the goods : if

1 Sec. 63, infra.
2 Sanders v. Jameson (1848) 2 Car. & Kir, 557; Phaggu Mal v. Babu Mal, (1913) 35 All. 325; Fisher Reeves & Co. v. Armour & Co., (1920) 3 K.B. 614, at p. 624; Bissendoyal v. Askaran, (1916) 23 Cal. L.J. 415, at p. 422=34 I.C. 290; Ishar Das v. Khannumal, A.I.R. 1927 Lah. 427; Empire Engineering Co. v. Municipal Board, Bareilly, A.I.R. 1929 All. 801.
3 Barker (Junior) & Co. v. Aguis Ltd. (1928) 43 T.L.R. 751.
4 Hyslop v. Shirlaw, 7 F. 875.
5 Upton Mfg. Co. v. Huiske, 69 Iowa 557.
6 See Bushel v. Wheeler. 15 Q.B. 442; Norman v. Phillips, 14 M. & W. 277.
7 Sharp v. Great Western Railway Co. (1841) 9 M. & W. 7; 60 R.R. 647.
8 Sanders v. Jameson, supra.; custom allowing only one day to accept or reject was held to be reasonable.
9 Heilbutt v. Hickson, supra.
10 Fisher v. Armour & Co. (1920) 3 K.B. 614, at p. 624.
11 Doraiswamy v. Subbanna, A.I.R. 1927 Mad. 880=105 I.C. 613.
12 Lucy v. Mouflet, supra;
13 Fisher Reeves & Co. v. Armour & Co. supra.
14 In re Andrew Yule & Co., A.I.R. 1932 Cal. 879=140 I.C. 877; Pranlal v. Maneckji, A.I.R. 1933 Bom. 46=140 I.C. 610.

therefore he accepts part, he accepts all[1]. Where the goods have once been accepted in such a case, the buyer can only treat the breach of a condition as a breach of warranty, and can claim damages[2].

Where the buyer who was responsible for not discovering an alleged breach of warranty earlier, sued to recover damages after having effected a re-sale; *held*, that the claim was not unsustainable[3].

Where the goods reached the plaintiffs-buyers on the 21st October and were resold on 22nd and the buyer for resale sent the intimation of damaged condition of goods on 30th October but the plaintiffs delayed for another fortnight,

Held, that the plaintiffs were not entitled to recover damages in view of their prolonged failure to give notice[4].

Grounds of rejection.

It has been held that the buyer by rejecting the goods on an insufficient ground is not precluded from supporting the rejection on other and valid grounds. It is a long established rule of law that a contracting party who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact exists, whether he was aware of it or not.[5] Where in a c. i. f. contract there was refusal to accept documents on the ground that the goods were lost before tender of them, it was held that the buyer was not precluded from supporting the rejection on the ground that the documents were not in order[6].

But when the contract is repudiated by a party before performance this amounts to a waiver of performance of the conditions precedent. So when the buyer wrongfully repudiates the contract before performance is due he cannot support the repudiation on the ground that the seller was not otherwise ready or willing to perform his part.[7] But a repudiation made after the due date does not operate as a waiver of the performance of the conditions precedent on the part of the other party.[8] A repudiation or rejection after breach on a wrong ground does not deprive the party repudiating or rejecting of his right to support his conduct on grounds actually existing at the time of breach unless there has been a waiver of such breach. But a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that if he had not refused the goods when delivered would not have been in accordance with the

1 Hardy & Co. v. Hillerns & Fowler (1923) I.K.B., at p. 666, per Greer J.; In re Andrew Yule & Co., A. I. R. 1932 Cal. 979=59 Cal. 928=140 I.C. 877; Pranlal Bhai Chand v. Maneckji Petit Manufacturing Co., A.I.R. 1933 Bom. 46 =140 I.C. 610.

2 See section 13 ante.

3 Mithan Lal Inder Narain v. Suraj Parshad Madan Gopal, A.I.R. 1932 Lah. 52=135 I.C. 498.

4 Mithan Lal Inder Narain v. Suraj Parshad Madan Gopal, supra.

5 Taylor v. Oakes, etc. (1922) 38 T. L.R. 349.

6 Manbre, etc. Co. v. Corn Products Co. (1919) IK. B. at p. 204; See also Alexander v, Webber (1922) IK.B. 642: repudiation supported by the subsequent discovery of fraud in the seller.

7 See British & Benington Ltd. v. N. W. Cachar Tea Co. (1923) A. C. 48.

8 Steel Bros. v. Dayal Khatao (1923) 47 Bom. 924, 935.

contract. In *Braithwate* v. *Foreign Hardwood & Co.*[1] the buyer wrongfully repudiated the contract on the ground that the seller committed a breach by supplying goods to third parties. The seller tendered some goods but the buyer refused to accept on the ground of previous repudiation. The seller thereupon resold the goods and sued for the recovery of the difference between the contract price and market price. There was in fact some inferiority in a portion of the goods. Held, the buyer could not set up the inferiority of the goods as a defence; he was held to have warned the performance of the condition precedent on the part of the seller by his repudiation.

Braithwaite's case was followed in *Nannier* v. *Rayalu Iyer*[2]. In that case the buyer accepted part of the goods and then repudiated the contract on the ground that the goods were not tendered by the seller within the time, alleged to have been agreed. The seller tendered some goods under the contract and then accepted the repudiation and sued for damages for breach of contract. The buyer pleaded non-liability not only on the ground that the goods tendered were not of the agreed quality. It was held that the buyer could not plead non-liability on the latter ground.

When right of rejection may be excluded.

The right of rejection may be excluded by the terms of the contract or by usage of trade[3]. An usage not to reject goods not excessively deficient in quality or deficiency in quality of which may be fairly compensated by an allowance, has been held to be reasonable and valid[4]. But an agreement or trade usage which excludes a right of rejection even if the goods do not altogether conform to their description in the contract of sale is not valid[5], in as much as to allow a stipulation against rejection to apply to a case of non-conformity to description would render the contract altogether nugatory[6] and, therefore a trade usage also to that effect cannot be incorporated in a written contract[7]. A usage that goods howsoever deficient in quality, shall, if they answer their general description be accepted, is also probably invalid.[8] The facts of the case may, however, sometimes show that, although a name is given to the goods, yet that they are not really sold under that description as where goods are sold for what they are, and in such case right of rejection may be excluded[9].

Allowance for inferiority.

In the absence of a contract to the contrary the buyer cannot be compelled to accept inferior goods with an allowance for such inferiority. But even if there is such an agreement the buyer can reject if the goods are different in kind.[10] In *Vigers Bros.* v.

1 (1905) 2 K.B. 543.
2 (1926) 49 Mad. 781. See also Rustomji v. Haji Hussain (1920) 22 Bom. L.R. 1165.
3 Heyworth v. Hutchinson, L.R. 2 Q.B. 447; Leary & Co. v. Briggs & Co., 6 F. 857.
4 Re Walkers, Winser, etc., (1904) 2. K.B. 152.
5 Shepherd v. Kain, 5 B. & Ald. 240.
6 Per Bigham J. in Vigers v. Sanderson (1901) 1 K.B. 608 (611).
7 Re North Western Rubber Co. etc. (1908) 2 K.B. 907 C.A.
8 Per Hawkins J. in Sinidino Ralli & Co. v. Kitchen & Co., (1883) Cab. & El. M. 217 (220).
9 Per Chennell L.J. in Cartes v. Crick, 4 H. & N. 412.
10 Azemar v. Casella (1867) L.R. 2 C.P. 431, 447, where the allowance caluse was held to have reference to inferiority of quality and not to difference in kind.

Sanderson Bros.[1] there was a contract for the sale of goods to be "about the specification stated below." The contract provided that the property in the goods was to be deemed to have passed to the buyers when the goods are put on board and if any dispute arose the buyers were not to reject the goods but the dispute was to be referred to arbitration. The goods were not according to specification. Held, the buyers were justified in rejecting the goods and were not bound to accept the goods subject to an allowance to be fixed by arbitration. The clause does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning.

A custom as to acceptance of goods with an allowance for inferiority was held reasonable.[2] But in *Ruttonsi* v. *Bombay United Spinning, etc. Co.*[3] a similar custom was held to be inconsistent with the express stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price.

Where there is a breach of warranty only the buyer cannot return the goods, but he can set off the damage against the price.[4] In *Roberts etc. Co.* v. *Meyer*[5] there were "goods to be taken with all faults and defects at a valuation." It was held that the clause applied to goods which answered the trade description and did not override the warranty under sec. 13 of the English Act.

Right to reject after payment

The buyer does not necessarily lose his right to reject by payment. This is especially the case where payment is made before the arrival or delivery of the goods, as in such cases the buyer does not get an opportunity of examining the goods before payment. In *Polenghi* v. *Dried Milk Co.*[6] there was a sale of goods by sample," payment to be made in cash on the arrival of the goods against shipping or railway document." The buyer had no opportunity of comparing the bulk with the sample before paying the price. His right to reject if the goods did not correspond with the sample was held not impaired by the payment being made. The buyer cannot be deemed to have accepted the goods until he had a reasonable opportunity of examination which he cannot do until the arrival of the goods[7].

In some cases bills of exchange are accepted against delivery of document. In such cases if the goods are not in terms of the contract the buyer can reject them and defend an action on the bill on the ground of total failure of consideration and he may not defend an action on the bill by setting off the damage (if the damage cannot be ascertained without collateral enquiry), but he can always sue for the damage sustained by him.[8]

1 (1910) 1 Q.B. 608.
2 Re Walkers (1904) 2 K.B. 152, 168. See also Produce Brokers Co. v. Olympia Oil Co. (1916) A.C. 314.
3 (1916) 41 Bom. 518, 539.
4 In Fl. Bourgeois Co. (1920) 25 Com. cas. 260; Heyworth v. Hutchinson (1867) L.R. 2 Q.B. 447.
5 (1930) 2 K.B. 312.
6 (1905) 10 Com. Cas. 42.
7 See Bragg v. Villanova (1923) 40 T.L.R. 154: f.o.b. contract.
8 See Ss. 43 & 44 Negotiable Instruments Act. See Bubby Hurry & Co. (1923) 4 Lah. 215.

Passing of property and acceptance.

If the property in the goods has passed to the buyer, he being the owner of the goods cannot reject them. So if the property in the goods has passed to the buyer before the receipt and acceptance of the goods, the buyer cannot reject them but is only left with the remedy of claiming damages only. Thus in the case of sale of specific goods the property generally passes at the time of the contract of sale and delivery may be made afterwards and the buyer cannot reject it. See *Varley* v. *Whipp*[1] where there was a sale of specific goods by description and property did not pass until acceptance. In the case of unascertained goods property passes by appropriation by one party and an assent to the appropriation by the other party, though the order may vary. If both have taken place before delivery and acceptance property has already passed to the buyer and he cannot reject.

Where goods *in terms of the contract are* delivered to a carrier the property passes and the buyer is bound to accept them. If the buyer on receipt of the goods finds that the goods are not in terms of the contract he is not bound to accept; but in such cases the property has not passed to the buyer, as they were not delivered *in terms of the contract.* If the buyer in such cases accepted the goods he waives the breach and the property is deemed to have passed not at the time of acceptance but at the time when they were delivered to the carrier. This is consistent with the view that the carrier is an agent to assent to the appropriation but not to accept the goods on behalf of the buyer. When the passing of property is conditional on the acceptance of the goods by the buyer (*e.g.* when the assent to the appropriation is to be deduced from acceptance) no difficulty arises. In such cases the property does not pass if the buyer refuses to accept, and it is immaterial whether the refusal is made rightly or wrongly.

Effect of acceptance-breach of warranty.

The buyer loses his right to reject the goods after acceptance but he retains the right to sue for damage for breach of warranty though he has notice of the breach unless there is a waiver on his part as to this. It seems there is no difference in this respect whether the warranty is express or implied. This follows from the general principle that every breach of contract gives rise to an action for damage.[2]

There is no provision in the present Act as to giving notice to the seller about any claim for compensation for breach of warranty. But failure to give notice may afford evidence that the goods were not defective or that there was waiver on the part of the buyer. At Common law failure to give notice was not considered as a bar to an action for damage. In *Poulton* v. *Latimore*[3] there was sale of seed with a warranty. The buyer after notice of defect proceeded to sow part of it and to sell the residue without giving any notice to the seller that it was defective in quality. In an action by the seller for the price the buyer could prove breach of warranty in diminution of claim or in extinction of it if the goods

1 (1900) I.Q.B. 578.
2 See S. 118 of the Contract Act (now repealed) Appendix B; Empire Engineering Co. v. Bareilly Municipal Board (1929) 27 All. L.J. 674.
3 (1829) 9 B & C 259.

are of no value. "The not giving notice indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract not-withstanding any length of time which may have elapsed since the sale".[1] In *Beck & Co.* v. *Szymanowski*[2] breach of warranty was discovered eighteen months after delivery.

Time limit for complaint.

When the contract provides that the complaints regarding the goods delivered should be made within a specified time after delivery, the seller would not be bound for any defect unless the complaint regarding it is made within the time specified. Such provisions are not void as coming under S. 28 of the Contract Act.[3]

In *Beck & Co. Szymanowski*[2] the clause provided that" goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within 14 days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract." Eighteen months after delivery the buyers discovered for the first time that the reels of sewing cotton sold were 6 per cent. shorter in lengths and brought an action against the seller for damage for breach of warranty. Held that the condition applied to quality only and not to quantity and that the buyers were entitled to damages. It was also held that the condition, if it applied to quantity, included the right to reject and not the right to claim damages. In *Taylor & Co.* v. *Ofverberg & Co.*[4] there was a claim for defects within ten days of delivery of document of title ; held, the ultimate purchaser could complain within the period. In a c.i.f. contract notice of claim was given within 14 days after delivery of documents. Held, notice was within the contract time.[5] See *Chapman* v. *Withers*[6] where under the circumstances the non-return of the horse within the period stipulated was held to be no bar to an action for breach of warranty.

Note. It may be noted that many of the English decisions dealing with the question of acceptance are decisions on the Statute of Frauds. The question presented to the court may be, whether there was a contract, or it may be whether the contract was fulfilled. In order that the contract may "be allowed to be good" within section 17 of the Statute of Frauds or "be enforceable by action" within section 4 (3) of the English Sale of Goods Act, it is sufficient to show an acceptance and actual receipt of a part, however small, of

1 Per Littledale J. at p. 265. See Shoshi v. Nobo (1879) 4 Cal. 801, 806: effect of fraud or misrepresentation in avoiding contract.

2 (1924) A.C. 43.

3 See Boroda Spinning etc. Co. v. Satya Narayan Marine etc. Co. (1913) 38 Bom. 344, 356 Claim under an insurance Co.

4 (1923) 39 T.L.R. 687; See also Pinnock Bros. v. Lewis Peat Ltd. (1923) I.K.B. 690; Scott v. Avery 5 H.L. Cas. 811; Board of Trade v. Cayzer etc. Co, 1927 A.C. 610; Berry & Sons v. Star Brush Co. (1915) 31 T.L.R. 603: time limit for exercising option to purchase.

5 Scriven Bros, v. Schmoll Fils & Co. (1924) 40 T.L.R. 677.

6 (1888) 22 Q.B.D. 824.

the thing sold; and yet the buyer may refuse to accept delivery of the bulk, not because there is not a valid contract but because the seller fails to comply with the contract, as proved. The cases, therefore, which decide that there has been an acceptance sufficient to satisfy the statute are no authority for the proposition that there has been an acceptance so as to oblige the buyer to pay for the goods, which is the meaning of the term in this section[1].

Buyer not bound to return rejected goods

43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods.

This section reproduces section 36 of the English Sale of Goods Act, 1893. The Indian Contract Act did not contain any provision corresponding to the persent section, although the rule it embodies was applied in India before the passing of the present Act[2].

The English Common Law rule before the passing of the English Sale of Goods Act, 1893, was that the buyer could reject the goods, either by giving notice of rejection, or by doing any unequivocal act showing that he had rejected them, and that he was not bound either to return the goods or to place them in the custody of a third party[3]. The rule enacted by section 36 of the English Act and by the present section is substantially the same although it does not profess to be the same[4].

In a case of rightful rejection, the buyer is not bound to put himself to the expense and trouble of returning the goods, and it is the seller's business to take away the goods, if he is so minded[5], and if the buyer offers to return them and the seller refuses to take them, the buyer, it seems, may charge for their keep[6]. The cost of returning them must be borne by the seller[7].

The goods must be placed at the disposal of the seller without obstruction. For instance, the buyer should not claim to keep them as security for purchase money paid in advance. The buyer in such a case is not in a position analogous to that of an unpaid seller within the meaning of section 45 (2)[8] and is not entitled to retain possession until the money paid has been returned. The buyer is, however, in the position of an involuntary bailee with respect to them.[9]

1. See Benjamin on Sale, 7th Edn., p. 270: Pollock & Mulla, Indian Sale of Goods Act, pp. 227 and 228.
2. Sumer Chand v. Ardeshir (1907) All. W.N 67; Phaggu Mal v. Babu Lal (1913) 35 All. 325; Buck v. Gordhandas A.I.R. 1923 Bom. 92=70 I.C. 877=24 Bom. L R. 991.
3. Grimoldby v. Wells (1875) L.R. 10 C.P. 391.
4. See Halsbury, Vol. XXV. (1st Edn.), p. 231 note (t).
5. Phaggu Mal v. Babu Lal, supra; Buch v. Gordhandas, supra.
6. Caswell v. Coare (1809) 1 Taunt. 566; 10 R.R. 606; Chesterman v. Lamb (1834) 2 A. & E. 129, 41 R R. 397.
7. Heilbutt v. Hickson, supra; Molling v. Dean (1902) 18 T.L.R. 217.
8. J. L. Lyons & Co. v. May & Baker, Ltd. (1923) 1 K. B. 685.
9. Okel v. Smith (1815) 171 E. R. 416; 18 R. R. 752.

The buyer must also after rejection of the goods act in relation thereto in a reasonable manner. He must take reasonable care of them as he would of his own goods, as his position in respect of them is still that of bailee like that of a carrier after the refusal of the goods by the consignee although he occupies such position involuntarily.[1] So when it is said that the goods are at the risk of the seller, what is no doubt meant is that the buyer is not responsible for accidents not caused by his default.[2]

The rule in this section applies, although the place of delivery and the place where the goods are inspected and rejected are not the same[3]. The reason is that there is no reason for throwing on the buyer the burden of a situation caused by no fault of his.[4]

Where the contract was to deliver goods in England in closed packages to be sent to a sub-buyer in America, the buyer being entitled to reject them at their rejection by the sub-buyer, it was held that the cost of returning goods from America was recoverable from the seller[5]. Where goods are resold before rejection and are rejected by the sub-buyer, the buyer, being entitled under the contract to reject them on such rejection by the sub-buyer, can claim from the seller also the expenses of carting and sending them to and from the sub-buyer, of warehousing them and returning them to the seller.[6]

It may, of course, be expressly agreed that the buyer must return the goods to the seller in case he rejects them[7].

This section presupposes the relation of seller and buyer. It does not appear to touch the case of goods delivered to a man on the chance that he may buy them. In such cases he will be liable as a bailee for particular purpose[8]. Buyer may intimate the rejection of the goods either orally or in writing. No particnlar form is necessary, it being sufficient if he does any unequivocal act showing that he rejects them.[9]

"Unless otherwise agreed"—These covering words are used to save special contracts. Where there is a contract between the parties that the goods rejected shall be returned by the buyer to the seller it is binding on the buyer inspite of the provisions of this section which do not apply to such case and if the buyer fails to return them after rejection he is liable for their price to the seller or for damages as the case may be.[10]

Liability of buyer for neglecting or refusing delivery of goods

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods he is liable to the

1 Heugh v. London & North Western Rail Co., L. R. 5 Exch. 51. See also proviso to section 26, supra.
2 Ibid ; O'Kell v. Smith, 1 Stark. 107.
3 See Heilbutt v. Hickson, supra.
4 Molling v. Dean, supra.
5 Molling v. Dean, supra.
6 Heilbutt v. Hickson, supra.
7 Vide the opening words of the section, "unless otherwise agreed."
8 Chalmors p. 106 ; Halsbuy, 1st Edn.. Vol 1, p. 6.
9 Grimoldby v. Wells, supra.
10 Ornstein v. Alexandra Furnishing Co., 12 T. L. R. 128 ; Mellor v. Street, 15 L. T. 223. See also S. 62 infra.

seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods :

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Buyer's liability when delivery not taken.

This section is based on section 37 of the English Act (Appendix A) "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract[1] " Where A contracts to build a steam launch for B by a fixed date, delivery to be made on a vessel found by B and A does not complete the launch by the contract time, but B does not notify A of a ship to receive the launch till A is ready to deliver, neither party has any remedy against the other[2].

The reference to the charge for the care and custody of the goods indicates that the section applies only to cases where the property has passed and the buyer neglects to take possession *i. e.* where the goods are kept against the seller's will. The seller cannot charge for keeping the goods if he detains them against the buyer's will in the exercise of his right of lien[3].

The proviso to the section saves all the rights of the seller in the case where the buyer's neglect or refusal amounts to a repudiation of the contract.[4] Mere delay by the buyer in taking delivery does not entitle the seller to rescind the contract, unless indeed the date at which he is to do so is of the essence of the contract. In the case of undue delay, however, the seller may give notice fixing a reasonable time, after the expiration of which he will treat the contract as at an end.[5]

In order that the seller may be entitled, under this section, to claim any loss due to the buyer's default or neglect and a reasonable charge for care and custody he must show firstly that he was ready and willing to deliver the goods, secondly that he had made the request to the buyer to take delivery, thirdly that the buyer did not within a reasonable time after such request take delivery of the goods, and lastly where loss is claimed owing to buyer's neglect or default in taking delivery that he suffered any loss or had to incur any expenses. Where he fails to show any of these four things, his claim must fail[6].

1 Greaves v. Ashlin (1813) 3 Camp. 426; 14 R R 471.

2 Forrestt v. Aramayo (1900), 9 Asp. Mar. Cas. 134 C.A.

3 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 150 f.n (p); Somes v. British Empire Shipping Co. (1860), 8 H.L. Cas. 338 at p. 344; 125 R.R. 186, 190.

4 See Mersey Steel Co. v. Naylor (1884) 9 App. Cas. 434, at p. 443; Braithwaite v. Foreign Hardwood Co. (1905) 2 K.B. 543, C.A. criticised in British etc. Ltd. v. H. W. Cachar Tea Co. (1923) A.C. 48, at p. 70

5 Compare section 55 of the Indian Contract Act.

6 Greaves v. Ashlin, (1813) supra; Somes v. British Empire Shipping Co., supra ; Hartley v. Hitchcock, 1 Stark 408.

CHAPTER V.

RIGHTS OF UNPAID SELLERS AGAINST THE GOODS.

"Unpaid seller" de-find

45. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(a) when the whole of the price has not been paid or tendered ;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.

Right of unpaid seller against the goods.

This Chapter deals with the rights of the unpaid seller against the goods. Where the property in goods has passed by a sale, the *right of possession* also passes but is defeasible in certain cases, as for instance, in the case of non-performance of conditions precedent or concurrent imposed on the buyer by the contract, or on the insolvency of the buyer When the property in the goods has passed to the buyer, the unpaid seller has three different rights, *viz.*, (1) the right to retain possession of the goods, (2) the right to stop the goods in transit and (3) the right to resell the goods. The circumstances in which these rights are available to the seller are different in each case.

Definition of "unpaid seller"—sub-section (1).

This section is based on section 38 of the English Act. The Indian Contract Act did not define the expression.

According to sub-section (1), the seller of goods is deemed to be an "unpaid seller" for the purposes of this Act (*a*) when the *whole* of the price has not been paid or tendered; (*b*) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

It is an essential condition of the definition that the seller should, besides being unpaid, have an immediate right of action for the price.[1] The price must be due in as much as there can be no lien without an immediate right of action for the debt. The seller is deemed unpaid even if the buyer has a right of set off.[2] The existence of a set off without an agreement to set off is not a payment of the debt,[3] and an offer by the creditor to set off a debt due from the person having a lien does not amount to a tender so as to discharge the lien.[4]

Whole price.

In the case of an entire contract, the expression 'whole price' means the whole amount stipulated. Therefore, even where a portion of the price is unpaid, the seller will be an "unpaid seller" for the purposes of this Act.[5] But, where the contract is severable, the term will mean only the apportioned price of such part of the goods as is retained[6].

Thus the unpaid seller's rights extend over every part of the goods for the price of all of them, except where, by the terms of the contract or otherwise. the price has been apportioned, as in the case of instalment contracts, where the instalments are to be separately paid for. In such cases the seller's rights are apportioned[7]. If the buyer becomes insolvent, then notwithstanding the apportionment of the price, the unpaid seller's rights are exercisable over every portion of the goods not paid for in respect of any part of the price of the goods due under the contract[8]. If any portion of the goods is paid for, the seller's rights over that portion are gone.[9]

A seller, however, is not unpaid if the buyer has tendered the price and the seller has refused to accept it ; in such a case the seller loses all his rights against the goods.

If there is a period of credit then the seller is not unpaid until the price becomes due. Again, if there is a condition attached to payment it must be fulfilled.

Payment of price is often made by a bill of exchange which is usually drawn on the buyer ; the buyer accepts it on presentation and pays on the due date. The buyer thus gets a credit during the period from the date on which it is drawn and the due date of payment.

Payment by negotiable instruments.

The second clause of the sub-section gives effect to the general presumption of conditional payment in the case of negotiable instruments. The seller is unpaid not only when the price has not in any way been paid or tendered in full, but also if he has taken bills of exchange or other negotiable instruments as conditional payment

Baitt v. Mitchell, (1818) 171 E.R. 47 ; 16 R.R. 765 ; Kuttayan Chetty v. Palaniappa (1904) 27 Mad. 540.
Pinnock v. Harrison, (1838) 150 E.R. 1256; See also Chase v. Westmore, (1816) 105 E.R. 1016, 17 R.R. 301.
Pinnock v. Harrison, supra.
Clarke v. Fell (1833), 4 B. & Ad. 404 ; See also Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 158, f.n. (d).
Hodgson v. Loy (1797) 7 T.R. 440, 4 R.R. 483.
Halsbury, Laws of England, 2nd Edn., Vol XXIX. p. 158 f.n. (d) and p. 159;
Exparte Chalmers, (1873) 8 Ch. Ap. 289; (cf.) Wentworth v. Outhwaite (1842), 10 M. & W. 436, 452 ; 62 R.R. 664.
Re Edwards, Exparte Chalmers, supra ; Morgan v. Bain (1874) L.R. 10 C.P. 15.
Re Edwards, Exparte Chalmers, supra.
Merchant Banking Co. v. Phoenix Bessemer Co. (1877) 5 Ch. D. 205.

and the buyer has failed to meet them at maturity or has become insolvent during their currency[1]. The rule is the same though the seller may have negotiated the bills, and they are still outstanding and not yet at maturity[2]. In a case where the seller had discounted the buyer's acceptances, but the latter failed before the bills matured, it was held that the seller was unpaid[3]. Mellish L. J. observed:

"No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill and, during the time that the bill is current, there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives ; or if the purchaser becomes openly insolvent before the delivery actually takes place, then ths law does not compel the vendor to deliver to an insolvent purchaser."

When payments are made by negotiable instruments there is a presumption that they are usually taken as conditiona, so that if the instruments cannot be sued upon (*e. g* owing to defective stamp) the seller can sue on the original considerationl[4]. In *Goldshede* v. *Cottrell*[5] the question whether the payment was absolute or conditional was held to be a question of fact.

As already noted, the condition is broken when the instrument is dishonoured.

Where the bill is running there is no debt, and so the seller is paid. So also where the bill, although it may be overdue, is outstanding in the hands of an indorsee or holder. If the buyer become insolvent, the fact that the seller has negotiated the buyer's acceptance taken as conditional payment,--and that the instrument is outstanding, does not prevent the seller being an unpaid seller[6].

But it is quite possible that a negotiable instrument may in particular cases be taken in absolute discharge. In such a case. there is no right available against the goods to the seller. as an unpaid seller,[7] Whether the instalment operates as a conditional payment or absolute discharge is, of course, a question of fact[8], though the rebuttable presumption is against its being an absolute discharge.

Sub-section (2)—meaning of "seller".

An extended meaning has been given to the word "seller" for the limited purpose of exercising the rights of lien, stoppage in transit and resale dealt with in Chapter V of the Act, and has no application to other remedies of the seller.

Sub-section (2) gives effect to the accepted view that the rights of an unpaid vendor against the goods should be available to any one whose position can be shown to be substantially analogous to that

1 Edwards v. Brewer (1837) 2 M. & W. 375, 46 R.R. 626.

2 Feise v. Wray (1802) 3 East, 93, 6 R.R. 551.

3 Gunn v. Bolckow Vaughan (1875) L.R. 10 Ch. App. 491; Exparte Lambton (1875) L.R. 10 Ch. at p. 415.

4 See Payana v. Panna Lal (1914) 41 I.A. 142.

5 (1836) 2 M. & W. 20. See also Re Refries & Sons (1902) 2 Ch. 425 : mere giving or indorsement of a cheque is not conditional payment of a secured debt so as to release the security.

6 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 158.

7 Cowasjee v. Thompson, (1845) 13 E.R. 454 ; also 18 E.R. 560 ; 70 R.R. 27.

8 Goldshede v. Cottrell (1836) 2 M. & W. 20.

of an ordinary seller, *e. g.*, seller's agent to whom a bill of lading is endorsed[1] or a surety for the price of goods who has paid the price to the seller,[2] or a broker contracting as principal[3], or a commission agent who is personally liable for the price.[4]

In *Jenkyns* v. *Usborne*[5] A consigned a cargo to Z in London exceeding the quantity which Z had contracted to take and drew two bills on Z, one for the price of the quantity contracted for, the other for the price of the residue. Z accepted the first bill and refused to accept the second. It was then agreed that B, who was A's London agent, should himself take the smaller portion. This agreement, as the court held, gave the right to Z to take possession of and receive his portion of the goods on the ship's arrival and B the right to receive the residue. B sold his interest in the cargo to P, taking P's bill. There was only one bill of lading which was held by Z, and P had only a delivery order addressed to the master of the ship. P pledged his interest in the cargo to Q and handed Q this delivery order. Before the ship arrived P failed and the bill which he had given to B was dishonoured B notified the master not to deliver his share of the cargo to anyone without further instructions. *Held*, that B was in the position of an unpaid seller, was entitled to stop his portion of the cargo in transit and had effectually done so as against Q.

The tendency of the decisions in England even before the enactment of the English Sale of Goods Act, 1893, was to give the rights of an unpaid seller against the goods to any one whose position could be shown to be substantially analogous to that of an ordinary seller[6].

As to the right of the consignor or other agents to exercise the rights of the unpaid seller see *Feise* v. *Wray*[7] where the rule of common law has been laid down. In that case the consignor, a factor, who had bought goods on his own credit on account and order of his principal, was held entitled to exercise his right of stoppage in transit. An agent of a bankrupt who has made himself responsible for the price of goods may stop them in transit.[8]

As to the rights of the commission agents against their principals see *Ireland* v. *Livingston*[9]. In *Imperial Bank* v. *London and St. Katherine etc*[10]. a surety who paid the price was held entitled under the circumstances to the possession of the goods as against the buyer's pledgee.

But a buyer who has rejected goods after paying for them is not an "unpaid seller," and has no lien on the goods till the price is refunded[11].

1 Morison v. Gray (1824) 130 E.R. 305; 27 R.R. 624; Cassoboglon v. Gibb (1883) 11 Q.B.D. 797; See also Venkatachala v. Ponnuswami Ayyangar, A.I.R. 1925 (Mad.) 46=82 I.C. 536.

2 Imperial Bank v. L. & St. K. Dock, (1877) 5 Ch. D. 195. See also section 140 of the Indian Contract Act, 1872.

3 Ramendra v. Brajendra, (1919) 46 Cal. 831=53 I.C. 886; See also Bombay Steam Navigation Co. v. Ram Dass (1912) 14 Bom. L.R. 582=16 I.C. 61.

4 Harilal v. Pehladarai, A.I.R. 1929 Bom. 260=120 I.C. 387.

5 (1844) 7 Man. & G. 678, 66 R.R. 767.

6 See Chalmers, Sale of Goods Act, 1893, 11th Edn., p. 109.

7 (1802) 3 East 93.

8 Hawkes v. Dunn (1831) 1 C. & J. 519.

9 (1872) L.R. 5 H.L. 395.

10 (1877) 5 Ch. D. 195.

11 Lyons & Co. v. May & Baker, (1923) 1 K.B. 685.

Payment when ordinarily due—see notes under section 55 infra.

Unpaid seller's rights.

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) a lien on the goods, for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

Rights of the unpaid seller—analogous law

This section corresponds to section 39 of the English sale of Goods Act, 1893 (Appendix A). It groups together in a convenient from all the rights of an unpaid seller which were scattered over a number of sections (95,99,107) in Chapter VII of the Indian Contract Act, 1872 (Appendix B).

The section declares generally the rights of an unpaid seller. When the property in the goods has passed to the buyer, he has the following rights :—

(1) lien,

(2) stoppage in transit,

(3) right of resale.

The next group of sections deal in detail with the rights of the unpaid seller as defined by this section against the goods after they have become the property of the buyer.

Sub-section (2) refers to other rights of an unpaid seller where the property has not passed to the buyer.

Sub-section (1)—unpaid seller's rights when property in the goods has passed to the buyer.

The seller's right of lien is distinct from his right of stoppage in transit, although the two rights are, in sense, analogous. Both rights arise when the property in the goods has passed to the buyer and in both these cases the buyer must have committed default in

paying the price. But the first right may be exercised whether the buyer be solvent or insolvent, and the second only when he is insolvent. The first presupposes possession by the seller, the second that he has parted with it. Or in other words, the right of stoppage in transit does not arise until the seller's lien is gone, for it presupposes that the seller has parted with the possession as well as with the property in the goods.

The right of resale presupposes that the unpaid seller is entitled to the exercise of his right of lien or stoppage in transit. Such a seller can resell the goods at the buyer's risk after giving reasonable notice to the buyer to pay the price[1].

These rights of the seller are not dependent in any way on any implied agreement between the parties but are incidents attached by law to the contract of sale, and can only be exercised by a seller or person in the position of a seller[2]. Bayley J. in *Bloxam* v. *Sanders*[3] stated the principles as follows :

"Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price. But the buyer has no right to have possession of the goods till he pays the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession[4], but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender, he has no right to the possession[5]. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him. but his right of possession is not absolute ; it is liable to be defeated if he becomes insolvent before he obtains possession.................. If the seller has dispatched the goods to the buyer and insolvency occurs, he has a right in virtue of his original ownership, to stop them in *transitu*. Why ? Because the property is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in *transitu fortiori*, it is when he has never parted with the goods and when no *transitu* has begun."

The implications of law may, however, be negatived under section 62. Or there may be circumstances creating a personal estoppel against the seller.

Sub-section (2)—rights when property remains in the seller.

Where property in the goods has not passed, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. Where property in the goods has not passed, *e.g.* where the seller has reserved his right of disposal. there is no need to invoke these rights at all, for the seller is still the owner and can exercise the rights of ownership which includes the above rights aud has the additional rights of

1 See Section 54, post.
2 Sweet v. Pym (1800), 1 East. 4; Siffken v. Wray (1805), 6 East., 371.
3 4 B. & C. 941 ; 28 R.R. 519.
4 i.e. to some carrier or other agent for transmission to the buyer. As to a case where the buyer himself obtains possession, see section 49.
5 Cf. section 32.

withholding delivery, called "quasi-lien".[1] Where property has not passed, the unpaid seller can withhold delivery where the buyer becomes insolvent[2] in addition to the other remedies provided by law, *e.g.*, right to sue for the price or a suit for non-acceptance of goods. And for this purpose, the fact that the sale was on credit is immaterial. It is likewise immaterial whether the goods are specific or unascertained[3]. Even if the seller is guilty of a breach before the insolvency of the buyer, he will usually only be liable to pay nominal damages[4]. In such cases the buyer has no rights against the goods and on refusal of the seller to deliver has only personal remedies against him[5]. But, as we shall see under section 58, the buyer in a proper case can sue for the specific performance of the contract of sale and prevent the seller from dealing with or reselling the goods; at the same time the unpaid seller has a right of withholding delivery similar to and co-extensive with the above rights.

In *Ex parte Chalmers*[6] there was a sale of goods to be delivered by instalment to be paid for in cash fourteen days after delivery. During the currency of the contract the buyer became insolvent and the price of one instalment was unpaid. *Held*, the seller need not make further deliveries unless the price of that instalment is paid and cash is paid against delivery of subsequent instalments.

Unpaid seller's lien.

Seller's lien

47. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(a) where the goods have been sold without any stipulation as to credit ;

(b) where the goods have been sold on credit, but the term of credit has expired;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

When lien exists.

This section is the same as section 41 of the English Act with the words "or custodies" after bailee in sub-section (2) added (see

1 (Cf.) Mordaunt v. British Oil & Cake Mills, (1910) 2 K.B. 502; Raju Naidu v. Kanakku Pillai, (1928) 54 M.L.J 116; See also Ex parte Chalmers, (1873) 8 Ch. Ap. 289.

2 Haji Karim v. Doma, A.I.R. 1924 Nag. 416=80 I.C. 639.

3 Griffiths v. Perry (1859) 120 E.R. 1065; 117 R.R. 897 (seller guilty of breach of contract to deliver before the buyer's insolvency, yet held liable only for nominal damages); Raju Naidu v. Kanakku Pillai, supra, =A.I.R. 1928 Mad. 279.

4 Valpy v. Oakeley (1851) 16 Q.B. 941, 83 R.R. 786 Griffiths v. Perry, supra.

5 See Moakes v. Nicholson, (1865) 19 C.B.N.S. 290.

6 (1873) L.R. 8 Ch. App. 289.

Appendix A) See also old sections 95 to 97 of the Indian Contract Act (Appendix B). Sub-section (1) describes circumstances in which the unpaid seller may exercise his right of lien. Subject to the provisions of this Act[1], the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(a) where the goods have been sold without any stipulation to credit;

(b) where the goods have been sold on credit but the term of credit has expired ;

(c) where the buyer becomes insolvent.

The effect of sub-section (1) may therefore be summed up in the proposition that a lien is exercisable when the price is due and unpaid[2].

Clauses (a) and (c) of this sub-section declare the law as it was laid down in *Bloxam* v. *Sanders*[3]. It was not decided in that case whether on the sale of goods on credit the seller could claim a lien upon them if they were still in his possession after the period of credit had expired, although the buyer had not become insolvent. This point was decided in *New* v. *Swain*[4] wherein it was held that when goods have been sold on credit, and remain in the seller's possession till the credit has expired, the seller's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. "Where the owner of goods sells on credit, the buyer has a right to immediate possession ; but if he suffers the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with the rent or not ; they are still in his possession.[5]"

It will be observed that the difference between the two cases of sale on credit is that the buyer's insolvency puts an end to his right to claim delivery, even where the term of credit has not yet expired; but where he remains solvent he does not lose that right until the term has expired.

Lien defined.

A lien in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied[6] ; and as the rule of law is, that in a sale of goods where nothing is specified as to delivery or payment, the seller has the right to retain the goods until payment of the price[7], he has in all cases a lien, unless he has waived it[8].

1 In this connection see sections 48, 49, 53 and 62 of the Act.
2 See Benjamin on Sale, 7th Edn. p. 874.
3 (1825) 4 B. & C. 941 cited at p. ante.
4 (1828), 1 Dans. & L. 193 ; 34 R.R. 767.
5 See also Bunney v. Poyntz (1833) 4 B. & Ad. 568 ; 2 L J.K.B. 55; 38 R.R. 309.
6 Per Cur. in Hammonds v. Barclay (1802), 2 East, 235. See Aggarwala's Law of Agency, p. 468.
7 Per Bayley B. in Miles v. Gorton (1834), 2 C. & M. 511 ; 3 L.J. Ex. 155 ; 39 R.R. 820.
8 See Benjamin on Sale, 7th Edn., p. 874.

Lien based on possession

The lien then is based on the unpaid seller's possession of the goods and not on title, and unless there is possession there is no lien[1]. It is not affected by his having parted with the documents capable of transferring the title. He may have given a bill of lading which passes the legal property in the goods or he may have given a delivery order which, though it does not pass the legal title or property in the goods, enables the person receiving it to acquire possession of the goods and to acquire title in that way. But whatever he has done in that respect does not as between himself and the buyer destroy his right of lien as long as he keeps possession of the goods as vendor and in no other character[2]. Thus it has been held that the fact that a delivery order has been given does not of itself give the buyer such a possession of the goods as to defeat the seller's lien for the price[3], but where the seller is estopped by his own conduct from denying that he had received payment for the goods to which the delivery order relates, he cannot exercise the lien under this section[4].

A seller will be in possession notwithstanding that some degree of control is given to the buyer, so long as the seller has not done anything to allow the goods to pass into the uncontrolled possession of the buyer. Thus the seller preserves his lien over goods stored in a place to which the buyer has access, but from which he cannot remove the goods without the seller's consent, as, for example, where the buyer has the inner, but the seller has the outer, key[5].

The lien presupposes that the property in the goods has passed. A person cannot have a lien on his own goods[6].

The possession of a servant or bailee of the seller is sufficient for the purpose of the section[7].

Lien extends only to price—Sale on credit—insolvency of buyer—clauses (*b*) and (*c*).

The lien extends only to the *price*. If by reason of the buyer's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such a claim, and the seller's remedy is personal against the buyer[8]. The fact that there is an unadjusted account current between the seller and the buyer will not divest his right, but the case may be different if there is any ascertained balance against the seller[9].

As the seller's lien is a right solely for the purpose of securing

1 Maneckjee v. Wadilal, A.I.R. 1926 P.C. 38=50 Bom. 360=94 I.C. 824.

2 Imperial Bank v. London & St. Catherine Docks Co. Ltd., (1877) 5 Ch. Div. 195, 200, Per Jessel, M.R.

3 Le Geyt v. Harvey (1884) 8. Bom. 501.

4 Anglo-Indian Jute Mills Co. v. Omademull (1910) 38 Cal. 127=10 I.C. 859.

5 Milgate v. Kebble, (1841), 3 M. & G. 100; 60 R.R. 475; Ex Parte Willoughby (1881), 16 Ch. D. 604; S.C. (1908) 2 K.B. 54; cf Wrightson v. McArthur (1921) 2 K.B. 807 (delivery of key of locked room).

6 Nippon Yusen Kaisha v. Ramjibhan A.I.R. 1938 P.C. 152=I.L.R. (1938) 2 Cal. 381=174 I.C. 564.

7 Owenson v. Morse, (1796) 101 E.R. 856.

8 Somes v. British Empire Shipping Co. (1859) 28 L J.Q.B. 220, Ex. Ch. affd. (1860) 8 H.L.C. 338; 125 R.R. 186.

9 Wood v. Jones (1825) 7 D. & R 126; Vertue v. Jewell (1814) 4 Camp. 31; Anglo-India Jute Mills Co. v. Omademull (1910) 38 Cal. 127: seller estopped from denying payment.

payment of the price, it follows that a tender of the price puts an end to the lien even if the seller declines to receive the money.[1]

During the currency of the bill given in payment the seller is paid, but on its dishonour, or the buyer's insolvency, the seller becomes unpaid and his lien revives[2].

A sale is on credit when the seller agrees to accept payment at a future date, and there is nothing to show that the buyer is not entitled to immediate delivery. A sale on credit excludes the lien during the currency of the credit[3], unless there be a trade usage to the contrary[4]. "It is .....undoubted law that, by a sale of specific goods for an agreed price, the property passes to the buyer and remains at his risk......and it is equally clear law that, where by the contract the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment[5]."

Where specific goods were sold to be paid for by cash in one month, less percent discount, this was held to be a sale on a month's credit, and not a sale for ready money with a month's grace[6].

Where the buyer becomes insolvent, the unpaid seller becomes entitled to his right of lien, whether credit has been given or not, and whether or not the insolvency occurs during the period of credit[7]. Provision in clause (c) being perfectly general, the seller's lien will revive even when the period of credit has not expired at the time when the buyer becomes insolvent. Insolvency before the due date of the bill of exchange revives the lien[8].

It will be open to the assignee in insolvency of the buyer to elect to affirm the contract within a reasonable time and obtain the goods on payment.[9] A sub-purchaser would probably have the same right[10]. The effect of the buyer's insolvency is that all stipulations as to credit are put an end to and the seller has a right to say "I will not deliver the goods until I see that I shall get my price paid".[11] But a repudiation of the contract on the insolvency of the buyer will be presumed if his assignee does not within a reasonable time intimate to the seller that he intends to complete the contract or tender the price[12].

Martindale v. Smith, (1841), I.Q.B. 389; 55 R.R. 285.

Valpy v. Oakeley, (1851) 16 Q.B. 941; 83 R.R. 786; Griffiths v. Perry, 28 L.J.Q.B. 204 : I.E. & E. 680 ; 117 R. R. 397.

Spartali v. Benecke (1850) 10 C.B. 212, at p. 223.

Field v. Lelean (1861), 6 H. & N. 617, Ex. Ch.

Spartali v. Benecke, supra, per Wilde, C.J.

Ibid.

Bloxam v. Sanders (1825) 4 B. & C. 941; 28 R.R. 519; Grice v. Richardson, (1877) 3 App. Cas. 319. P.C.; See Re Nathan, Ex. parte Stapleton (1879) 10 Ch.D. 586, C.A.; Re Edwards Ex. parte Chalmers (1873) 8 Ch. App. 289. Re Pnoenix Co., etc. (1876) 4 Ch. D. 108.

9 Grey v. Lamond, (1913) 40 Cal. 523 =18 I.C. 753; Ex. parte Stapleton (1879), 10 Ch. D. 586, C.A.; Mess v. Duffus (1901), 6 Com. Cas. 165 (action for damages for non-acceptance).

10 Kemp v. Falk (1882) 7 App. Cas. 573, at p. 578. Pritchett v. Currie (1916) 2 Ch. 515: lien of sub-contractor who supplied goods to the seller who became insolvent before payment by the buyer.

11 See Griffiths v. Perry (1859) I.E.E. at p. 688.

12 Ex-parte Chalmers (1873) L.R. 8 Ch. at p. 294; Morgan v. Bain (1874) 4 L.R. 10 C.P. 15; Grey v. Lamond (1913) 40 Cal. 523, 531. Kemp. v. Falk (1882) 7 A. C. 573,575.

Even if the seller has broken his contract to deliver while the buyer is solvent, his lien revives on the buyer becoming insolvent, and the buyer's trustee is only entitled at most to nominal damages for the breach, unless the value of the goods at the time of breach was above the contract price[1].

Instalment contracts

As regards instalment contracts, Mellish L. J. says: "The seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered......It would be strange if the right of a vendor who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods[2]."

For the purposes of the present section a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of insolvency or not [*Vide S.* 2 (8) *ante*]. It is not necessary that he should be adjudged an insolvent.

Cost of repairs

The vendee purchased a second-hand refrigerator for Rs. 120/ and it was agreed between him and the vendor that the refrigerator should be put in order at a cost of Rs. 320/- The purchaser took delivery and admitted that its condition was satisfactory. Later, he said that it was not in working order and the vendor took away two parts of it for further repairs, the thermostat and the engine. The full bill for repairs had not, however, been paid and the vendor claimed a lien on the parts taken for the balance of the original cost of repairs and refused to return the same until he was paid the balance due for the original repairs. *Held*, that when the contract was fully performed and when the goods were handed back (although cost of the repairs had not been fully paid) the lien was ended and it could not be revived because the vendor undertook further repairs.[3]

Clause (a)—no stipulation as to credit.

The law applicable where there is no provision as to credit was thus stated by Bayley B. in *Miles* v. *Gorton*[4]:

> "The general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price."

Sub-section (2)—seller in possession as bailee of the buyer.

Sub-section (2) deals with the question whether a seller is entitled to exercise his right of lien when he is in possession of the goods as

1 Valpy v. Oakeley, and Griffiths v. Perry, supra.

2 Ex parte Chalmers (1873), L.R. 8 Ch. App. 289, at p. 293; cf. Exp. Stapleton supra.

3 Eduljee v. John Bros., A.I.R. 1943 Nag. 249=209 I.C. 356.

4 (1834), 2 C. & M. 504, at p. 511; 39 R.R. 820.

an agent or bailee of the buyer. The old common law rule was that though the goods may remain in the possession of the seller, yet, if it is agreed between the seller and the buyer that the former's possession shall thenceforth be that of a bailee for the buyer, and not that of a seller, the right of lien is gone[1]. The lien is only revived if the buyer becomes insolvent[2]. In *Grice* v. *Richardson*[3] the appellants who traded in Australia, imported three parcels of tea which they sold to the respondents, who gave their acceptance or promissory notes for the price. The appellants were also warehousemen, having a bonded warehouse in which they had stored the tea on its importation. On selling the tea to the respondents, the appellants handed them delivery orders each of which stated that the tea to which it referred was warehoused by the appellants. The delivery orders were subsequently endorsed by the respondents to W. & Co. and entries were made at the warehouse that the tea had been transferred to W. & Co. Subsequently W. & Co. became insolvent and their acceptance and notes were dishonoured, by which time part of the tea had been delivered to W. & Co. and part remained in the warehouse, for which the appellants had not been paid. *Held*, that the appellants as vendors retained their lien in respect of the tea which remained in the warehouse.

The common law rule was abrogated in England by section 41 (2) of the English Act and section 47 (2) of the Indian Act is based on the statutory rule adopted in that sub-section. It definitely states that the seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

If the buyer be solvent, and entitled to credit, he can of course during the currency of the credit call upon his agent, the seller, to deliver the goods, for at that time there is no "right of lien" for the seller to exercise[4].

If the goods are in the possession of a third party who is holding the goods as the agent of the seller, the lien attaches; but it is not available after such third party attorns to the buyer.[5]

It may be observed that in India no question arises as to whether such an arrangement between the seller and buyer will now constitute a "receipt" sufficient to satisfy the Statue of Frauds. It, however, appears that the provision of this sub-section will not be entirely irrelevant if in any case the question should arise whether the seller is in possession within the meaning of section 30 (1).

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien. Part delivery

1 Cusack v. Robinson (1861) 30 L.J.Q.B. 261 at p. 264.
2 Townely v. Crump (1835) 4 A. & E. 58.
3 (1877) 3 App. Cas. 319, P.C.
4 Per Bayley, J. in Bloxam v. Sanders, supra; see Benjamin on Sale, 7th. Edn, p. 880.
5 See McEwan v. Smith (1849) 2 H.L. cas. 309; Poulton v. Anglo American Oil Co. (1911) 27 T.L.R. 216; Hammond v. Anderson (1809) 2 Camp. 243.

Part delivery.

This section follows section 42 of the English Act (See Appendix A) and the principle is to be found in the *Illustration* to old section 106 of the Indian Contract Act (See Appendix B). It states that the unpaid seller's lien is not lost by reason of the seller making a part delivery, unless such part delivery is tantamount to a waiver of the lien[1].

A part delivery may or may not be a delivery of the whole, according to the intention of the parties. In *Kemp* v. *Falk*[2], Lord Blackburn said :—

"In agreeing for the delivery of goods with a person, you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole then it is a delivery of the whole ......and the onus is on those who say it was so intended.

In other words, a delivery of part is *prima facie* only a delivery of that part. This adopts the common law rule.

Although a delivery of part of goods in progress of the delivery of the whole, has the same effect for the purpose of passing the property in such goods, as a delivery of the whole; and a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder for such purpose,[3] yet in either case, whether it is made in progress of the delivery of the whole or with an intention of severing it from the whole, it does not operate to extinguish the lien of the unpaid seller in the part undelivered[4]. But this rule is only specially meant for the protection of the seller's right of lien. So where there is none there is no occasion for the application of section 48.

Where the circumstances under which delivery of part of the goods is made are such as to raise an inference that the seller agrees to waive his right of lien, such part delivery may destroy the lien in the rest of the goods as well as which remain undelivered[5]. Such agreement may be inferred where the delivery is of an essential part of the goods sold as for example an essential part of a machine[6], or where the character of the person taking delivery, or the object for which it is taken, is such as to show a common intention to treat the part delivery as a delivery of all the goods[7], or where part delivery takes place in circumstances showing that the seller's agent in possession of the goods has acknowledged to the buyer that he holds the goods on his behalf[8].

But the fact that the goods are in the seller's own possession is important to show that a part delivery is not intended as a

1 Dixon v. Yates (1833) 5 B & Ad. 313, at p. 341; 39 R.R. 489, 499; Miles v. Gorton (1834) 2 Cr. & M. 504; 39 R.R. 820.
2 (1882) 7 A. C. 573.
3 See section 34, supra.
4 Bunney v. Poyntz, 4 B. & Ald. 568; Tanner v. Scovell, 14 M. & W. 28; Dixon v. Yates, 5 B. & Ald. 313.
5 Ibid.
6 Re McLaren, Exp. Cooper, (1879) 11 Ch. D. 68 at p. 75.
7 Jones v. Jones (1841) 8 M. & W. 531.
8 Hammond v. Anderson, 1 B. & P. N. R. 69.

complete delivery[1]. In this case the sellers sold a parcel of hops consisting of two kinds; twelve packets of Kent hops and ten packets of Sussex hops. They rendered one invoice for the whole, which expressed that the goods remained at rent for account of the buyer. A bill of exchange was given in payment. The buyer sold the ten packets, and they were delivered to his sub-buyer. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the sellers for the twelve packets remaining on hand. It was held that the delivery of part did not constitute delivery of the whole, not being so intended by both parties.

This section is very similar to section 34 and the principles enunciated in the cases cited under that section equally apply to this and may be referred to[2].

In *Tanner* v. *Sovell*[3] M bought of B certain goods, "delivered alongside the wharf." The sellers gave the following order, addressed to the defendants: "Please weight and deliver to Mr. M. forty-eight bales glue pieces." The defendants weighed and sent a return of the weight to B. who thereupon sent an invoice to M. About a month later the defendants delivered five of these bales to a sub-buyer of M on the latter's order. Other vessels arrived with further goods, which were treated in the same way by handing delivery orders to M, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendants' books to M, nor was any rent charged to him. Another partial delivery was made to a sub buyer of M, and the sellers then notified the defendants to make on further deliveries, M being then in debt to them about £700. M became bankrupt, and his assignees brought action in trover against the defendants. *Held*, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and, secondly, that the delivery of the part removed from the wharf was not intended to be, and therefore did not operate as, a delivery of the whole, but was a separation for the purpose of that part only.

No case has been met with where the delivery of part has been held to constitute a delivery of the remainder when kept in the *seller's own custody*[4].

Part delivery under instalment contracts.

Section 48 obviously presupposes that there is an existing "right of lien" at the time when the delivery of the remainder of the goods is claimed after a part delivery. Accordingly, for example, if the goods are deliverable by instalments which are not to be separately paid for, as payment is due only on full delivery, the

1 Miles v. Gorton, supra.

2 See Slubey v. Heyward, 2 Bl. H. 504; 3 R.R. 486; Hammond v. Anderson, 1 B. & P.N.R. 69; 8 R.R. 763. (In these two cases there was a delivery of the whole, not because a part was carried away, but because the seller's agent and bailee in each case had attorned to the buyer. There was in each case an agreement between the seller, the buyer, and the bailee, that the last named should thenceforth hold for account of the buyer). In Bunney v. Poyntz (1833), 4 B. & Ald. 568; 38 R.R. 359 the intention of both parties was to separate the part delivered from the residue, and the vendee took possession of part only.

3 14 M. & W. 28.

4 See Benjamin on Sale, 7th Ed., p. 891.

seller has no lien *ab initio*, and the buyer can claim delivery of all the goods. But the lien will come into existence in circumstances like the buyer's insolvency[1]. Where the contract is an entire contract i.e. for a single price, although delivery is agreed to be made by instalments, the seller is entitled to retain goods in his possession for the entire sum which remains unpaid if entire price is not to be paid for on complete delivery[2].

As regards severable contracts, if, for instance, delivery is to be made by three instalments, and the first instalment has been delivered and paid for and the second has been delivered but not paid for, the seller cannot withhold delivery of the third instalment till he has been paid for both the second and third instalments, unless (1) the non-payment involves a repudiation of the contract under section 38 *ante*, or (2) the buyer is insolvent[3]. But any instalment which has been paid for must be delivered, even though the buyer be insolvent[4].

As already observed under section 47, the trustee in bankruptcy of a bankrupt purchaser, and it seems also a sub-purchaser, may elect to fulfil the contract by tendering the price in full within a reasonable time, although the seller is not bound to tender the goods.

Buyer may be let into possession as bailee of seller.

In order that the seller's lien may be divested, the possession taken by the buyer must be taken in his capacity of buyer. For the buyer may be let into possession of the goods far a special purpose, or in a different character from that of buyer.

Thus A might refuse to deliver a horse sold to B *qua* purchaser, but lend it to him for a day or a week[5]. Where a watch was lent by the pownees to the pawnor, it was held that the pawnor possessed as agent of the pawnees, and that they could recover the watch in trover against third person, to whom the pawnor had pledged it a second time[6]. In *North Western Bank* v. *Poynter*[7], pledgees of a bill of lading who had handed it to the pledgors to enable the latter to sell the cargo on account of the pledgees were held not to have lost their security, the pledgor's possession being only that of the pledgees' agents for a special purpose.

When goods in the custody of a bailee.

When the goods are in the custody of some bailee of the seller's, it may appear that the bailee had, with the consent of the seller, attorned to the buyer in respect of the whole, and where this is not the case it must still be shown that the part delivery took

1 Per Jessel, M.R., in Ex. p. Carnforth Hæmatite Iron Co. (1876), 4 Ch. D. 108, at 113. See Halsbury, 1st Edn., Vol. XXV, p. 243, note (e).

2 Halsbury, ibid.

3 Ex. p. Chalmers (1873), L.R. 8 Ch. App. 289; cf. Sooltan Chand v. Schiller (1878) 4 Cal. 252; Chalmers, Sale of Goods Act, 11th Edn., p. 113; Steinberger v. Atkinson & Co., (1914) 31 T.L.R. 110: no lien on goods delivery of which was wrongfully refused.

4 Merchant Banking Co. v. Phoenix Bessemer Steel Co. (1877), 5 Ch. D. 205.

5 Tempest v. Fitzgerald (1820), 3 B. & A. 680; 22 R.R. 526.

6 Reeves v. Capper (1838), 5 Bing. N.C. 136; 50 R.R. 684.

7 (1895) A.C. 56.

place in such circumstances as to make it a delivery of the whole[1].

It may be observed that a decision under the Statute of Frauds in England, that an acceptance of part of goods ordered, where the contract included several classes of goods, made the contract enforceable as to all the goods contracted for, and not only as regards the parts to which the parcel accepted belonged[2] has nothing to do with the effect of part delivery as regards the seller's lien or right to stop in transit either at common law or under the present Act[3].

49. (1) The unpaid seller of goods loses his lien thereon— **Termination of lien.**

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) when the buyer or his agent lawfully obtains possession of the goods;

(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Termination of lien.

This section follows section 43 of the English Act. There was no corresponding provision in the Indian Contract Act. This section declares that the unpaid seller of goods loses his lien thereon—

(*a*) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b*) when the buyer or his agent lawfully obtains possession of the goods;

(*c*) by waiver thereof.

Blackburn observes[4]:

"When the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he would recover any other debt,[5] and has no longer any claim on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price

1 Compare Tanner v. Scovell, supra with Hammond v. Anderson, supra, in this connection. In the latter case the buyer had, in addition, weighed and therefore, had had actual physical possession of the whole.

2 Elliot v. Thomas (1838) 3 M. & W. 170, 49 R.R. 550.

3 See Sale of Goods Act, by Pollock and Mulla, p. 244.

4 Blackburn on Sale. 2nd Ed., p. 318.

5 Cf. Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co. A.I.R. 1926 P. C. 38 (1926); 50 Bom. 360=94 I.C. 324 (sale of shares).

be unpaid and the buyer insolvent unless, indeed, the whole transaction is vitiated by actual fraud."

Clause (*a*)—loss of lien on delivery to a carrier or other bailee

The unpaid seller's lien is a possessory lien and the right is available so long as the seller remains in possession of the goods either himself or through his agents.[1] When goods are delivered to a carrier or other bailee, such as a forwarding agent of the buyer, for being transmitted to the buyer, without reserving the right of disposal under section 25 (1) *ante*, the lien is lost. This is so because such delivery is *prima facie* deemed to be a delivery to the buyer[2]. The reservation of the right of disposal, indeed, prevents the delivery to the carrier being a delivery to the buyer, but as in such cases the property remains in the seller[3], no question of his parting with his lien really arises, for the right of lien only comes into existence when the property has passed. But when the property has passed, and the seller, though entitled to retain possession, deliberately parts with the possession by delivering the goods under the contract, he abandons his rights over the goods. A right of stoppage *in transitu*, however, arises should the buyer become insolvent, and it this is exercised the right of lien revives.[4]

The phrase 'without reserving the right of disposal' here means 'without constituting the carrier the seller's own agent,' instead as is generally the case, the agent of the buyer as under section 39 sub-section (1).[5] Thus a shipment when the bill of lading is taken to the order of the seller or his agent is a delivery to the master as the agent of the seller[6]. In all cases in which the seller constitutes himself or his agent as the consignee of the goods or agrees to deliver the goods at their destination the possession of the goods being still with the seller his lien continues over them. But when the delivery to the carrier is such or under such circumstances as to constitute the carrier an agent of the buyer, the carrier being a bailee of the buyer the possession passes to the buyer, and there being left no control of the goods in the seller the lien is extinguished.

A delivery order is however a mere token of authority to deliver. Therefore the giving of a delivery order by the vendor to the vendee does not of itself give the vendee such a right to the goods as to enable him to defeat the vendor's lien[7]. A delivery order

1 See Owenson v. Morse, (1796) 7 T.R. 64.
2 See Section 39 (1), ante.
3 See Section 25 (1).
4 The buyer may re-deliver the goods to the seller or, in certain cases, agree to the seller re-taking possession of the goods (Bhimji N. Dalal v. Bombay Trust Corporation, A.I.R. 1930 Bom. 306, 54 Bom. 381, 124 I.C. 800), with the right to hold them on the same terms as if he had the seller's lien: but here the right is created by express contract, and does not, as does the seller's lien properly so called, arise by implication of law; and such transactions may amount to a fraudulent preference; Re O' Sullivan (1892) 61 L.J.Q.B. 228; cf. In re Nripendra Kumar Bose A.I.R. 1930 Cal. 171, 56 Cal. 1074, 121 I.C. 745). Apart from such an express contract, the seller regains no rights over the goods by obtaining possession of them from the buyer, Valpy v. Gibson, infra.
5 Craven v. Ryder, 6 Taunt 433; Ruck v. Hatfield, 5 B. & Ald. 632.
6 Wait v. Baker, 2 Ex. 1; Gabarron v. Kreeft, Kreeft v. Thompson, L.R. 10 Exch. 274.
7 Le Gey v. Harvey, 8 Bom. 501.

properly so called is a mere promise to deliver[1], and delivery is not complete until the bailee attorns to the buyer and thus become the buyer's agent as custodian of the buyer[2]. The seller's lien is not affected until the buyer has obtained possession of the goods or the acceptance of the delivery order by the bailee signifying the bailee's assent to hold on his behalf[3]. These cases however should be carefully distingusihed from the cases where, although the bailee has accepted a delivery or other order constituting himself as the agent of the buyer, the buyer's title to the goods is not complete because something yet remains to be done to the goods by the seller or the bailee as the seller's agent[4]. In such cases inspite of the delivery or other order having been accepted by the bailee, if the buyer becomes insolvent, the seller can countermand the order. In such cases the right continues until that something which remained to be done by the seller and for want of which the buyer's title was incomplete is done and his title is completed[5]. The rules laid down above also apply *mutatis mutandis* to other documents of title[7]. But the endorsement of a delivery order or a bill of lading or other documents of title to the goods which entitles the buyer to demand the delivery of the goods from the carrier or custodian thereof without any further act being needed from the seller transfers to the buyer not only the property in such goods but also possession thereof and is a complete delivery[8] divesting the seller of the right of his lien on such goods[9].

In *Valpy* v. *Gibson*,[10] the goods were ordered of the Manchester sellers, and sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso ; but the Liverpool house had no authority to forward *till receiving orders* from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the sellers, with orders to repack them into eight packages, instead of four ; and the sellers accepted the instructions writing, "We are now re-packing them in conformity with your wishes." While they were still in the possession of the sellers for that purpose, the buyer became insolvent. Thereupon the sellers refused to deliver them to the buyer's trustee in bankruptcy except upon payment of the price. *Held*, that the right of stoppage was lost and the sellers had lost their lien by delivering the goods to the shipping agent, that the *transitus* was at an end when the goods reached the forwarding agents, and that the re-delivery to the sellers for a new purpose could give them no lien.

The seller may. however, undertake to deliver the goods to the buyer at the destination, and the carrier is then the seller's agent.[11]

Ibid ; Gillman v. Carbutt, 61 L.T. 281; J.C. Shaw v. Bill, 8 Mad. 88 ; G.I.P. Railway Co., v. Hanumandas, 14 Bom. 501.
Bentall v. Burn, 3 B. & C. 423 ; Farina v. Home, 16 M. & W. 110.
McEwan v. Smith, 2 H.L. Cas. 309 ; Griffiths v. Perry, I.E. & E. 680.
See sections 21 & 22 supra.
Busk v. Davis, 2 M. & S. 397 ; Wallace v. Breeds, 13 East, 522.
Hammond v. Anderson, 1 Bos. & P. (N.R.) 69.
7 Farina v. Home, 16 M. & W. 119 ; Bartlett v. Holmes, 22 L.J.C.P. 182.
8 Sanders v. Maclean, 11 Q.B.D. 327 (341).
9 See Bills of Lading Act, IX of 1856, sections 1 and 2.
10 4 C.B. 837 ; 72 R.R. 740.
11 Dunlop v. Lambert (1838), 6 Cl. & F. 600; 49 R.R. 1[illegible]; Badische v. Basle Chemical Works, (1898) A.C. 200 ; 67 L. J. Ch. 141.

The seller may also reserve the right of disposal, which he *prima facie* does when, on shipment, he takes a bill of lading making the goods deliverable to the order of himself, or of his agent.[1] This reserves, not only the right of property, but also the possession, for such a delivery is not a delivery to the buyer, but to the captain of the vessel on behalf of the person indicated by the bill of lading,[2] and it is by the indorsement and delivery only of the bill of lading that a symbolical delivery of the cargo is effected.[3]

Clause *(b)*—on buyer obtaining possession.

Section 33 *ante* explains the various methods by which possession can be given to the buyer, and clause (*b*) states that the unpaid seller of goods loses his lien thereon when the buyer or his agent lawfully obtains possession of the goods. This follows from the fact that the right of lien presupposes that the seller is in possession of the goods, and that it would naturally cease to exist as soon as the buyer or his agent lawfully obtains possession of the goods.[4]

In order to defeat the lien it is not necessary that the buyer should obtain possession of the goods, it is enough if the seller parts with their possession. When the buyer obtains possession, both the rights of lien and stoppage in transit are lost, and the seller's remedy is only for the price. In *Schotsmans* v. *L. & Y. Ry.*[5] which was a case of stoppage in transit, delivery on board the buyer's ship was held under the circumstances to be delivery to the buyer.[5]

The addition of the word "lawfully" shows that the possession must not be obtained tortiously as against the seller.[6] If possession of the goods is obtained by the buyer by some tortious act, the seller may take them back, if he can do so, or sue the buyer in trover if he refuses to re-deliver them, the reason being that the mere right to have possession of the goods is a sufficient right upon which to found that action."[7]

When the goods are in the possession of a third person at the the time of sale, the seller's lien continues until such third person attorns to the buyer.[8] Thus where the seller's agent in possession of the goods attorns to the buyer with the seller's consent, the lien will cease[9]. Where the seller delivers the goods to the buyer on condition that the buyer is to hold them as the seller's bailee, the right of the seller to the goods is in the nature of a special property rather than a lien properly so called[10]. If at the time of the contract the goods are in the possession of the buyer himself as the seller's bailee, the completion of the contract of sale turns the buyer's previous possession as a bailee into possession as owner and terminates the

1 Section 25 (2) ante.
2 Per Parke, B. in Wait v. Baker (1848) 2 Ex. L 76 R.R. 469.
3 Per Bowen L.J. in Sanders v. Maclean, (1883), 11 Q B.D. 327, at 341 (C.A.); see Benjamin on Sale, 7th Edn., p. 884.
4 Re McLaren, Ex parte Cooper (1879) 11 Ch. D. 68, C.A.
5 (1867) L.R. 2 Ch. App. 332, 335.
6 See Wallace v. Woodgate (1824), R. & M. 193.
7 Cf. Litt v. Cowley (1816) 7 Taunt. 169, 17 R R. 482.
8 Grigg v. National Guardian Assurance Co. (1891) 3 Ch. 206; M' Ewan v. Smith (1849) 9 E.R. 1109; 81 R.R. 166; Castle v. Sworder (1861) 6 H. & N. 828; 123 R.R. 860; see section 36 (3) ante.
9 Dodsley v. Varley (1840) 12 A. & E. 632, at p. 634; 54 R.R. 652, 654.
10 Cain v. Moon (1896) 2 Q.B. 283; Kilpin v. Ratley (1892) 1 Q.B. 582.

seller's lien. But attornment by the seller himself will not divest the lien[1].

Where the seller allows the buyer to take the chattel temporarily, for the purpose of trying, and the buyer then refuses to return it to the seller, the result will be the same as in the case of obtaining possession by some tortious act. The delivery would not then be under the contract of sale, but under a special contract of bailment[2].

Clause (c)—waiver of lien.

The seller's lien may, of course, be waived expressly. It may also be waived by implication at the time of the *formation* of the contract when the terms show that it was not contemplated that the seller should retain possession till payment; and it may be abandoned during the *performance* of the contract by the seller's actually parting with the goods before payment.[3]

Where the seller takes security for the price on terms inconsistent with the existence of the lien, an implication of waiver may arise[4]. Thus, as already noticed, by selling the goods on credit the seller waives his lien during the currency of the credit, unless in the meantime the buyer becomes insolvent. The same will be the result if after the contract of sale he accepts conditional payment by taking a negotiable instrument for the price, though the lien would revive on its dishonour[5], or takes some other security which postpones the date of payment and is therefore inconsistent with the right of lien[6]. The seller thus may waive his lien by assenting to a sub-sale; and if he parts with the documents of title and they come into the hands of a third party, he may thereby lose his lien[7]. It is essential that the security taken should be inconsistent with the lien[8].

Waiver by seller's wrongful repudiation of contract or claim of possession on other grounds.

The lien is also waived by implication where the seller repudiates the contract by wrongfully refusing[9], or rendering himself unable[10], to deliver the goods, or by using or dealing with them in a manner inconsistent with a mere right of possession, as, for example, by consuming them[11]. So also where he does not rely upon a right

1 See section 42 (2) ante.
2 See Allen v. Smith (1862) 11 W.R. 840. Ex. Ch.; and cf. Tempest v. Fitzgerald (1820) 3 B. & Ald. 680, 22 R. 526.
3 See Benjamin on sale, 7th Edn., p. 887 and section 62 post.
4 Chambers v. Davidson (1866) L.R. 1 P.C. 296. (Cf.) Re Morris (1908) 1 K.B. 473 (case of solicitor's lien); Bank of Africa v. Salisbury Mining Co. (1892) A.C. 281; Re Leith's Estate, (1866) 1 P.C. 296 (lien created by contract excludes statutory lien).
5 Valpy v. Oakeley (1851), 16 Q.B. 941, at p. 951; Griffiths v. Perry (1859), 1 E. & E, 680, at p. 686; see also Miles v. Gorton (1834) 2 C. & M. 504; 39 R. R. 820.
6 Knights v. Wiffen (1870), L.R. 5 Q.B. 660; seller consenting to sub-sale by the buyer.
7 See section 53.
8 See Angus v. McLachlan (1883) 23 Ch. Div. 330; Bank of Africa v. Salisbury Mining Co. (1892) A.C. 281.
9 Jones v. Tarleton (1842), 9 M. & W. 675; 60 R.R. 863; Kerford v. Mondel (1859), 28 L.J. Ex. 303; Davies v. Vernon (1844), 6 Q.B. 443: 66 R.R. 457.
10 Jones v. Cliff (1833), 1 C & M. 540, 38 R.R 686 (case of a person having redeemed goods from pawn at the request of the owner); Gurr v. Cuthbert (1843), 12 L.J. Ex. 309, 61 R.R. 787; Mulliner v. Florence (1878) 3 Q.B.D. 484, C.A. (innkeeper).
11 Gurr v. Cuthbert and Mulliner v. Florence, supra.

of lien, but claims to keep the goods upon some other ground[1]. In all these cases the seller dispenses with payment or tender of the price.[2]

As a practical result of it, in such cases the person whose lien is waived cannot, when sued by the owner, defeat his action by setting up the lien or objecting that the amount due in respect of which the lien is exercisable had not been tendered before action brought.[3]

A case of wrongful resale of the goods is provided for by section 54, and in a case where the seller wrongfully consumes the goods, presumably the damages would be the value of the goods, less the purchase price or that part of it which remained unpaid, that is to say, the value of the buyer's actual interest in the goods[4].

It was held in *Morton* v. *Woodfall*[5] that the mere taking of a personal security is not tantamount to abandonment of the lien.

If the goods are re-delivered to the seller by the buyer with the intention of revesting the right of lien, the right of lien revives. But the mere obtaining possession of the goods subsequently does not revive the lien[6].

Sub-section (2)—decree for the price—lien not destroyed by judgment for the price.

Sub-section (2) declares that the unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods. It is declaratory of the common law rule.[7] The result is that though the debt is merged in a decree, the lien on the goods is not destroyed unless the seller attaches them in execution of the decree, for he gives up his right to the possession of the goods by letting the sheriff take possession.[8]

Stoppage in Transit.

Right of stoppage in transit.

***50.** Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in transit, and may retain them until payment or tender of the price.

Boardman v. Sill (1808) 1 Camp. 410 (n): refusal to deliver without insisting on lien amounts to a waiver of lien.
Yungmann v. Briesemann (1893), 67 L.T. 642 (C.A.).
Jones v. Cliff and Jones v. Tarleton, supra. See Benjamin on Sale. 7th Edition, p. 888.
See Jones v. Tarleton, James v. Cliff, Mulliner v. Florence, supra.
Chivery v. Viall (1860) 5 H. & N. 288, 120 R.R. 588.
A.I.R. 1927 Lah. 103=8 Lah. 257=99 I.C. 770.
Halsbury, Laws of England, 2nd Edition, vol. XXIX, p. 166.
Houlditch v. Desanges (1818) 2 Stark. 337, 20 R.R. 632.
Jacobs v. Latour (1828) 5 Bing. 130.

Analogous law.
Section 44 of the English Sale of Goods Act, 1893, and old section 99 of the Indian Contract Act—see Appendix.

Right of stoppage in transit.

Another remedy which an unpaid seller has against the goods is stoppage in transit. This right arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts[1]. If, therefore, after the seller has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have already noticed, is such a constructive delivery as divests the seller's lien), he discovers that the buyer is insolvent he may retake the goods, if he can, before they reach the buyer's possession, and may retain them until payment or tender of the price[2].

It may be noted that the right of stoppage in transit arises only after the seller has parted with the possession of the goods and if the buyer becomes insolvent. This right is only available when the goods are neither in the possession of the seller or buyer or any agent of them, but are in the possession of a middleman or intermediary, for the purpose of transmission to the buyer.[3] It is a much narrower right than the right of lien because it only arises in case of the buyer's insolvency, whereas the right of lien is available to the unpaid seller in every case in which he is in possession of the goods the price of which has become payable. As already pointed out, the right of stoppage in transit can only arise after the right of lien has come to an end.[4]

The history of the law of stoppage in transit is given very fully by Lord Abinger in *Gibson* v. *Carruthers*[5], and this is extracted and supplemented by some very useful remarks in Lord Blackburn's book[6].

When can the right be exercised.

Right of stoppage in transit can be exercised only when the following conditions are satisfied :—The seller is unpaid;[7] the buyer must be insolvent : the property must have passed[8]; the seller must have parted with the possession of the goods and the buyer must not have acquired it. Strictly speaking, stoppage in transit takes place only where the goods have become the property of the buyer. Where they remain the property of the seller, the latter may withhold them by virtue of his ownership, but this is not stoppage in transit by the law merchant.[9]

Further, the right can only be exercised by a seller or a person in a position analogous to that of a seller[10].

Per Lord Northington, L.C. in D' Aquila v. Lambert (1761), 2 Eden. at 77; Amb. 399.

See Benjamin on Sale, 7th Edition, p 917.

See Schotsmans v. L. & Y. Ry. (1867) L.R. 2 Ch. at p. 338.

See notes under section 46, ante.

(1841), 8 M. & W. 337; 11 L.J.Ex. 138; 58 R.R. 713; See also Rash Behari Karuri v. Narain Das (1923) 50 Cal. at p. 406.

6 Blackburn on Sale, Part 3, Chapter I.

7 As to this see section 45, ante and notes thereunder.

8 See section 46 (2), ante, as to the right of the seller to withhold or countermand delivery in the case of executory contracts.

9 See Lickbarrow v. Mason (1793), 6 East, 21, at 27 n.; 1 R.R. 425; Blackburn on Sale, 2nd Edition, p. 330.

10 Section 45 (2), ante.

Nature of the right.

The right of stoppage in transit is a right against the goods themselves. "If they arrive injured and damaged in bulk or quality the right to stop *in transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property[1].

Thus the right cannot be availed of against the proceeds of an insurance policy effected by the buyer[2]. As between the right of stoppage in transit and the carrier's lien for a general balance of account, the former has precedence[3] though not of his lien for the special charges on the goods carried.[4] Similarly, the right of stoppage will prevail over a third party's attachment of the goods[5].

The resumption of possession by the seller does not necessarily amount to a rescission of the contract, but is done in the exercise by an unpaid seller of his right to insist on his lien for the price.[6] The stoppage does not revest the property in the goods in the unpaid seller. "It is a retaking by the unpaid vendor, either on the cancellation of the contract, as some people say, or, as I should rather say, on resuming possession for the purpose of insisting on his lien for the price at any time while the goods are in the hands of the carrier, and have not reached the hands of the purchaser or consignee, and when they are not in his possession[7]. So the seller is bound to deliver the goods as soon as the price is paid or tendered. If the price is tendered by the buyer's assignee in insolvency the seller is bound to deliver the goods, as the insolvency of the buyer does not put an end to the contract; but the tender must be made within a reasonable time after insolvency[8].

In *Rash Behari* v. *Narain Das*,[9] the nature of the right is dealt with in detail.

Extent of the right.

The right is available only so long as the goods are in transit. It stops just short of delivery of the goods to the buyer. It is enough for the valid exercise of the right of stoppage in transit that the buyer becomes insolvent before the end of the actual transit. It is not necessary that at the very moment of the stoppage the buyer must be insolvent, and the right may be exercised in anticipation of the insolvency of the buyer[10] though in such a case the seller stops the goods at his own risk, and if it turns out that the buyer is solvent

1 Berndtson v. Strang (1868) L.R. 3 Ch. App. 588, at p. 591, per Lord Cairns; see also Schotsman v. Lancashire & Yorkshire Ry. Co. (1867) 2 Ch. App. 332; Bethell v. Clark (1888) 19 Q. B. D. 553, 20 Q.B.M.D. 615, C.A.

2 Berndston v. Strang, supra.

3 Oppenheim v. Russel (1802) 127 E.R. 24; 6 R.R. 604.

4 Morley v. Hay (1888) 3 M. & Ry. (K.B.) 396.

5 Smith v. Goss (1808) 170 E.R. 958; 10 R.R. 684.

6 See S. 48 (1) supra; Page v. Cowasjee (1866) L.R. 1 P.C. at p. 145.

7 Per Cotton L. T. in Phelps & Co. v. Comber (1885) 28 Ch. D. at p. 821.

8 See Exparte Chalmers (1873) L. R. 8 Ch. 289; Jaffer v. Budge Budge Jute Mills (1907) 34 Cal. 289.

9 A.I.R. 1923 Cal. 182=(1923) 50 Cal. 399=80 I.C. 485.

10 The Tigress, (1863) 167 E.R. 286; The Constantia, (1807) 165 E.R. 947.

the seller is answerable in damages in addition to his liability to deliver the goods[1].

Delivery taken by the buyer's trustees in bankruptcy * on the delivery of the goods into the buyer's warehouse after his bankruptcy puts an end to the transit, as bankruptcy does not rescind the contract.[2]

An insolvent buyer may rescind the contract in cases where it is only an agreement to sell with the consent of the seller: and then the subsequent delivery of the goods in the buyer's possession cannot affect the seller's rights, since the property in the goods will not be in the buyer. Where the property has passed, the buyer may decline to take possession, thus leaving the seller free to exercise the right of stoppage.[2] But in some circumstances such an act of the buyer may amount to a fraud.

The rule as to stoppage in transit applies both to cases of carriage of goods by land and sea.[3]

The effect of stoppage in transit is not to rescind the contract between the carrier and the purchaser or to vest the property in the goods in the unpaid seller.[4]

Where the property has not passed to the buyer, the right of the seller to withhold delivery while the goods are in transit is not, properly speaking, a right of stoppage in transit but an analogous right which is recognised by law[5].

Against whom the right of stoppage in transit is available.

The right of the unpaid seller to stop the goods while they are in transit until he is paid off is available against the buyer who has become insolvent and against his representative in interest *i e.* trustee or official assignee or receiver in insolvency,[6] or attaching creditor,[7] or sub-buyer or any other person who derives his interest in the goods from the buyer.[8] There exists a conflict of opinions as to the question whether the right is available against the attaching creditor of the buyer,[9] but weight of the authorities is for the affirmative.[10] As to when and how far the right is available against a sub-buyer or other person who derives his interest from the buyer, notes under section 53 *infra* may be referred to.

51. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or

Duration of transit

G.I.P. Ry. v. Hanmandas (1890) 14 Bom. 57 ; Lilladhar v. George Wreford, (1898) 17 Bom. 62 ; See also Halsbury; Laws of England, 2nd Edition, Vol. XXIX, pp. 167, 177.

Ellis v. Hunt (1789) 3 T.R. 464 ; 1 R.R. 743 ; Scott v. Pettit (1803) 127 E.R. 255 ; 7 R.R. 804.

Blackburn on Sale, 3rd Edition, p. 413; See Kendal v. Marshall (1883) 11 Q. B. D. 356, at p. 364.

Booth S. S. Co. Ltd. v. Cargo Fleet Iron Co, Ltd. (1916) 2 K. B, 570 C. A.

5 See section 46 (2) ante ; See Turner v. Liverpool Docks (Trustees) (1851) 6 Exch. 543 ; Ex. Ch. ; 86 R. R. 377.

6 Grice v. Richardson, 3 App. cas. 319.

7 Smith v. Gross, 1 Camp. 282.

8 See section 53, infra.

9 See Blackburn, p. 411 ; Remfry, p. 337.

10 Smith v. Goss, 1 Camp. 282 ; Bhola Nath v. Baijnath, 1 Agra H.C. 11 ; Mercantile & Exchange Bank v. Gladstone, L.R. 3 Exch. 233 ; Keith v. Burrows, 2 App. cas. 651.

other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

Analogous law.

This section is based on section 45 of the English Sale of Goods Act, 1893, (See Appendix A) and in fact reproduces it with some slight verbal differences. It replaces old section 100 of the Indian Contract Act (See Appendix B). In the English Act the expression used is '*in transitu*' while in the present Act, the English phrase "in transit" is used, though there is absolutely no difference between the meanings of the two expressions.

Meaning of "transit."

The term "transit" does not necessarily imply that the goods are in motion, for the goods may be in transit even when they are

lying deposited with a forwarding agent as such[1]. The essence of stoppage *in transitu* is that the goods should be in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them[2].

Sub-section (1)—duration of transit.

The transit is held to continue from the time the seller parts with the possession until the purchaser acquires it; that is to say, from the time when the seller has so far made delivery that his right of lien is gone to the time when the goods have reached the *actual* possession of the buyer[3]. Sub-section (1) clearly lays down that 'goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.'

This sub-section assumes that the delivery to the carrier is as agent of the buyer for carriage. If the carrier is the agent of the seller, no question of stoppage can arise. Where a seller having instructed his own agent to deliver countermands the order[4], or himself refuses delivery, or, having dispatched goods to his own agent or factor, countermands the delivery by the carrier to the agent, so as to prevent the agent acquiring a lien[5], these are not cases of stoppage in transit within the meaning of this sub-section (3). In such cases *a lien*, and not a right of stoppage, comes in question.

Section 46 of the Act must be read with section 51 of the Act and where as a matter of fact the transit is at an end and the goods are at home then the right of stoppage of the unpaid-seller is gone. Where goods are unloaded from the Railway and delivered over to the buyer in his godowns, the transit is at an end. The fact that later on the Railway Company passes an order to the effect that the goods should not pass to the buyer until freight had been paid is of no avail to the seller so as to enable him to retain or exercise his lien[6].

Mere non-payment of freight although it sometimes raises a presumption that the *transitu* is not at an end is not sufficient. Where the first consignment of the goods purchased by the insolvent vendee had actually been unloaded in the godown of the vendee without payment of freight before the countermanding order was given by the vendor, the right to the freight is waived and the consignment ceases to be in transit and the vendor has no right over it.

The right of stoppage in transit is an equitable right which arises wholly from the insolvency of the buyer and is based up the plain reason of justice and equity that one man's goods shall not be applied in payment of another's debts. The right continues so long as the goods are in the possession of a carrier or other bailee for

1. See Blackburn on Sale, 3rd Edn., p. 362.
2. Schotsman v. Lancashire Railway (1867) L.R. 2 Ch. App. 332, at p. 338.
3. Benjamin on Sale, 7th Edn., p. 927.
4. McEwan v. Smith (1849), 2 H.L.C. 309; 81 R.R. 166.
5. Kinloch v. Craig (1790), 3 T.R. 783; 1 R.R. 664 (H.L.).
6. Narain Das Tikkam Das v. Official Assignee, A.I.R. 1936 Sind 203=165 I.C. 559.

transmission in his capacity as such to the buyer and are made deliverable to him; and it is immaterial whether the document obtained from the carrier or other bailee for transmission of goods is made out in the name of the buyer both as consignor and as consignee of the goods or not, provided the goods are delivered for transmission by the vendor and not by the buyer[1].

The right arises after seller has parted with title and actual possession

The seller's right in the goods is very frequently not ended on their arrival at their ultimate destination because of his having retained the *property* in them, through the reservation of the right of disposal *i.e.*, of the *title* to the goods. The stoppage in transit is called into existence for the seller's benefit after the buyer has acquired *title and right of possession*, and even *constructive*, though not *actual* possession[2].

The constructive possession above referred to is the possession of the buyer through his agent, the *carrier*. The term is also used to mean a possession which (unlike constructive possession in the sense above mentioned) *divests* the seller's right of stoppage, *viz.*, the possession of the buyer's agent not to carry, but to *hold* the goods at the disposal of the buyer[3].

In *James* v. *Griffin*[4] goods were consigned by ship to the purchaser deliverable in the river Thames. On their arrival the purchaser, being pressed by the captain of the ship to have them landed, sent his son with directions to land them at a wharf, where he was accustomed to have goods landed for him and to take them thence in his own carts. The purchaser was then insolvent, and told his son that he did not intend to meddle with the goods and that the seller ought to have them. The goods were by the son's directions landed at the wharf, and there they were stopped by the seller. It was held that, as the purchaser had not taken possession of the goods as owner, the transit was not at an end. Parke B., in the course of his judgment observed :

> "The delivery by the vendor of goods sold to a carrier of any description either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee ; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession......The actual delivery to the vendee or his agent, which puts an end to the transitus, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods[5], or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself[6] ; or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

Goods are deemed to be in transit as long as they remain in the possession of the carrier *qua* carrier[7]—a qualification to be kept in view, for he may become bailee for the buyer as warehouseman or

1 Narain Das v. Official Assignee, A.I.R. 1936 Sind 105=163 I.C. 875.
2 See Benjamin on Sale, 7th Edn., p. 928.
3 Ibid, p. 928; see remarks on Brett L.J. in Kendal v. Marshall, (1883), 11 Q.B.D. 356, at 364-365.
4 2 M. & W. 623, 42 R.R. 243.
5 Scott v. Petitt (1803) 3 Bos. & P. 469, 7 R.R. 804; Rowe v. Pickford (1817), 8 Taunt. 83; 19 R.R. 466.
6 Dixon v. Baldwen (1804), 5 East. 175; 7 R.R. 681.
Mills v. Ball (1801) 2 B. & P. 457 ; 5 R. R. 658.

wharfinger after his duties as carrier have been discharged—and it makes no difference that the carrier has been named or appointed by the buyer[1].

The transit does not cease merely by reaching the destination, but continues till the goods come into the possession of the buyer[2]. The test is not whether the goods have arrived, at their destination but whether, having arrived, there has been delivery to the buyer. Thus, where the indorsee of a railway receipt from the purchaser, after paying the freight loaded the goods in his carts, but became insolvent before the carts left the goods' compound of the railway station it was held that the transit had terminated and that the company had no right to stop the goods on behalf of the unpaid seller[3]. Similarly, the goods are deemed to be in transit, though in fact lying deposited with a forwarding agent[4]. "The essence of stoppage" says Lord Cairns "is that the goods should be in the possession of a middleman"[5] between the vendor who has parted with the goods and the buyer who has not yet acquired possession.

It is not necessary that the goods should actually be in transit, *i.e.*, moving but it is sufficient if they are in the hands of a carrier for being carried to their destination[6]. As transit includes the possession of forwarding agents[7], where goods are lying in a place of deposit for the purpose of transmission the goods are deemed to be in transit. The transit continues so long as the goods are not delivered to the buyer. Lord Esher observed[8]:

> "Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purpose of transmission and delivery until they arrive at the actual possession of the consignee or at the possession of his agent who is to hold them at his disposal and deal with them accordingly."

This delivery to the buyer or his agent may be either at the actual destination or the buyer may even obtain the goods at a place short of the destination. Parke, B said[9]:

> "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the purchaser, unless in the meantime, they have come to the actual or constructive possession of the vendee."

As regards the term "destination," Lord Esher says that it means sending the goods to a particular place to a particular person Destination

Bethell v. Clark (1888) 20 Q.B.D. 615, C.A.; Hodgson v. Loy (1797) 7 T.R. 440; 4 R.R. 483; Berndston v. Strang 1867 4 Eq. 481 Ex parte Rosevear China Co. (1879) 11 Ch. D. 560.
Heinekey v. Earle, (1857) 120 E. R. 158; 112 R. R. 627.
G. I. P. Ry. Co. v. Hanmandas (1890) 14 Bom. 57; See also Naraindas v. Official Assignee, A. I. R. 1936 Sind 106 =163 I. C. 875.
Ex parte Barrow (1877) 6 Ch. D. 783; Smith v. Goss, (1808) 170 E. R. 958; 10 R.R. 684.
Schotsman v. Lancashire Railway (1867) 2 Ch. Ap. 332.
Fraser v. Witt (1868) 7 Eq. 64.
See Rodger v. Comptoir D'Escompte De Paris (1869) 16 E. R. 618; Noble v. Adams (1816) 129 E. R. 24; 17 R. R. 445; Tanner v. Scovell (1845) 153 E. R. 375; 69 R. R. 644.
Kendal v. Marshall (1883) 11 Q. B. D. 356; Foster v. Frampton (1826) 108 E. R. 892; 30 R. R. 255.
Whitehead v. Anderson (1842) 152 E. R. 219 (226); 60 R. R. 819.

who is to receive them, and not sending them to a particular place without saying to whom.[1] "Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance".[2]

Delivery of the goods to the buyer means more then mere arrival of the goods at the destination; the buyer must take actual or constructive possession of them. This could be inferred from some act or conduct of the buyer *e. g.* when after arrival the freight is paid by the buyer or his assigns.[3] The arrival which is to divest the vendor's right of stoppage in transit must be such as that the buyer has taken actual or constructive possession of the goods; and that cannot be so long as he repudiates them.[4]" In *G. I. P. Ry.* v. *Hanmandas*[5] the transit was held to be determined on payment of freight by an indorsee of the Railway Receipt who also loaded the goods in carts though he became insolvent before the goods left the compound of the Railway Station. In *Jackson* v. *Nichol*[6] transit was not at an end though the goods reached the port of destination and were put on lighters.

Termination of transit

The buyer may take delivery from the carrier or other bailee by taking possession of the goods from him or by attornment or acknowledgement of his carrier, etc., to the buyer indicating that he is holding the goods on his behalf.[7] Where the carrier enters into an agreement with the buyer to hold the goods as agent of the consignee, but not as a carrier, the transit will be put an end to[8]. But where the attornment of the carrier is relied on, that attornment must be founded on mutual assent. If the carrier does not assent to hold the goods for the buyer, or if the buyer does not assent to his so holding them, there is no attornment[9].

The fact that the freight is unpaid is strong, though not conclusive, evidence that the carrier is in possession of the goods, as such, and not as the buyer's agent.[10]

The course of transit may be fixed either by the contract, or subsequently by directions given by the buyer to the seller[11]. Where goods are consigned partly by one route, and partly by another, and those sent by one route are effectively stopped in transit, the stoppage does not revest in the seller the right to the possession of the goods by the other route, the transit whereof has ended.[12] But the seller's lien being entire, he may exercise it over the goods stopped for the price of all the goods[13].

Ex p. Miles, (1885) 15 Q. B. D. 39, at p. 43, C. A.

Per Lord Fitzgerald in Kemp v. Falk (1882), 7 App. Cas. 573, at p. 588.

See Liladhar v. Wreford (1898) 17 Bom. 62, 91.

Bolton v. L. & Y. Ry. (1866) L. R. 1 C. P. at p. 440.

(1890) 14 Bom. 57.

(1839) 5 Bing. N. C. 508.

See Reddall v. Union Castle, etc. Co. (1914) 84 L. J. K. B. 360 ; goods were intercepted by the buyer at an intermediate stage of transit ; held, the transit was at an end.

8 Lyons v. Hoffnung (1890) 15 A. C. 391, Whitehead v. Anderson, supra ; Ex parte Cooper (1879) 11 Ch. D. 68.

9 See James v. Griffin, supra ; (offer to attorn not accepted by buyer) ; Kemp v. Falk, supra (carrier not agreeing to change his character).

10 Kemp v. Falk. supra.

11 Re Love, Ex parte Watson (1877) 5 Ch. D. 35, C. A. Bethell v. Clark, supra.

12 Wentworth v. Outhwaite (1842) 10 M. & W. 436 ; 62 R. R. 664.

13 See Benjamin on Sale, 7th Edn. page 942.

Any tortious act of the carrier after the goods are "at home" will not prolong the transit[1]. In *Bird* v. *Brown*[2] a pretended notice to stop the goods in transit was given by some merchants, who had, however, no authority from the seller to give it. Subsequently the assignees of the bankrupt buyer formally demanded the goods from the carrier, tendering the freight at the same time. The carrier refused to deliver to them and on the same day delivered them to the merchants, who had given the ineffectual notice to stop. The transit was held to be at an end and both the carrier and merchants were liable in trover; and a later attempt by the seller to ratify the stoppage of the goods by the merchants was of no effect.

Principles explained

The principles underlying this sub-section have been very lucidly explained in *Bethell* v. *clark*[3]. In that case the buyer bought goods of Messrs. Clark and Co., the defendants, at Wolverhampton, and after the contract was made, sent them a consignment note in these terms: "Please consign the ten hogsheads hollow ware to S. S. 'Darling Downs' to Melbourne. loading in the East India Docks here." The goods were sent by railway, and the railway company shipped them, and obtained and sent the mate's receipt to the buyer, but the latter did nothing with it. The sellers gave notice to the railway company stopping the goods, but too late to prevent shipment, and the ship sailed with the goods on board. But before she arrived at Melbourne the sellers gave notice to the shipowners[4] claiming the goods as their property. After the arrival at Melbourne the trustee in bankruptcy of the buyer demanded the bills of lading from the master. *Held*, that the goods had been effectually stopped the transit not terminating until the ship had reached Melbourne.

Cave, J. 19 Q. B. D. at p. 561 said:

"In all cases of stoppage *in transitu*, it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment that the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitus* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor.[5] But however fixed. the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles."

Lord Esher M. R. (*same case on appeal*—20 Q. B. D.) observed at p. 617—

"When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit has begun. The way in which that question has been dealt with is this. Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor. the right of

1 LilLadhar v. George (1898) 17 Bom. 62, 88.

2 (1850) 154 E. R. 1433; 80 R. R. 775.

3 19 Q. B. D. 553, 20 Q. B. D. 615; C. A.

4 See section 52 (1).

5 The case of Rosevear China Clay Co. supra, however. shows that it is not absolutely necessary that the destination should be actually named.

stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone. So also if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit."

Goods in passage on the buyer's own cart or vessel are not in *transitu*

The delivery of goods to a servant is delivery into the actual possession of the master. If, therefore, the buyer sends his own cart or his own vessel, for the goods, they have as a rule reached the buyer's *actual possession* as soon as the seller has delivered into the cart or vessel[1].

But if the seller desires to restrain the effect of a delivery of goods on board the buyer's own vessel, he may do so by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not an agent to receive possession for the purchaser, as where the seller takes the bill of lading to his own order, or to that of his agent, whereby he reserves the right of disposal[2].

Sub-section (2)—buyer obtaining delivery before goods reaching destination.

Though the seller may have directed delivery by the carrier at a certain place, it is open to the carrier by arrangement with the buyer to deliver wherever the later directs. In such a case, according to sub-section (2), the transit is at an end[3]. The vendee may thus "anticipate the place of destination if he can succeed in getting the goods out of the hands of the carrier.[4]" The carrier and consignee might agree together for the delivery of goods at any place they please.[5]

The agent mentioned in sub-section (2) is the buyer's agent to take delivery so as to determine the transit, not an agent for transmission to the appointed destination[6]. The buyer may obtain delivery of the goods by the carrier's attornment to him during the transit. And a test of such an attornment, when the goods are intercepted by the buyer, is whether they will again be set in motion without fresh orders of the buyer. If they will not, the transit is ended[7].

Consent of both buyer and carrier seems necessary

In *Whitehead* v. *Anderson*[8] Parke B. observed that "if the vendee takes the goods out of the possession of the carrier into his own before their carrival at the destination, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action." This was not assented to by Blackburn[9] and the doubt

1 See Benjamin on Sale, 7th Edn., p. 930 and the authorities cited thereunder.
2 Ibid; See also section 25 (2) ante.
3 Mills v. Ball, supra.
4 Kendal v. Marshall, (1883) 11 Q.B.D. 856 (869).
5 L. & N. W. Ry. Co. v. Bartlett (1861) 7 H. & N. 400; 31 L.J. Ex. 92.
6 See Benjamin on Sale, 7th Edn., p. 946.
7 Reddall v. Union Castle Co. (1915), 84 L.J.K.B. 360; 112 L.T. 910.
8 (1842), 9 M. & W. 518, at p. 534.
9 Contract of Sale; p. 259; 2nd Ed., p. 375.

suggested seems to be justified by the decision in *Bird* v. *Brown*[1], which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case, the carrier tortiously refused possession to the purchaser when the goods had arrived at their destination ; and it was held that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver, that the transit was at an end, and the right of stoppage gone[2]. It, therefore, seems clear that consent of both the buyer and the carrier seems necessary.

It is a question of fact in each case in which capacity the carrier is holding the goods. One test of his character is whether he receives the instructions necessary for forwarding from the seller or buyer. . The transit is at an end when the goods reach the hands of a forwarding agent appointed by the buyer even though the goods were intended for an ulterior and subsequent destination.[3] In *Valpy* v. *Gibson*[4] the goods were sent to a forwarding house under buyer's instructions. They were then returned to the seller under the buyer's instructions for repacking them into eight packages instead of four and the sellers accepted the instructions. It was held that the transit was at an end and redelivery to the seller for a new purpose did not revive the right of lien. In *Ex parte Miles*[5] transit was at an end when the goods reached the forwarding agent at the destination to which they were sent by the seller, the further carriage being under the direction of the buyer.

Sub-section (3)—attornment of carrier to buyer on reaching destination.

If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer. This is attornment of carrier to the buyer and in such a case the transit is at an end. As Parke, B. observed in *Whitehead* v. *Anderson*[6]:

> "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee or his agent, not for the purpose of expediting them to the place of original destination pursuant to the contract, but for the purpose of custody on his account and subject to some new or further order to be given to him."

Such attornment of the carrier to the buyer may be express or implied, but it can only be with mutual consent[7]. As the sub-section itself states, the mere fact that the buyer indicates a further destina-

(1850), 4 Ex. 786 ; 19 L.J. Ex. 154 ; 80 R.R. 775, supra.

See also L. & N. W. Ry. Co. v. Bartlett, supra ; and section 2 (2) ante, defining delivery as a voluntary transfer of possession.

Kendal v. Marshall (1883) 11 Q.B.D. 356.

(1847) 4 C.B. 837.

(1885) 15 Q.B.D. 39. See also Ex-parte Watson (1877) 5 Ch. D. 35: where there was an express agreement as to transit.

(1842) 152 E.R. 219 supra ; See also Foster v. Framton (1826) 108 E.R. 892; 30 R.R. 255.

Exparte Barrow (1877) 6 Ch. D. 783: where the buyer absconded and so could not give his assent ; James v. Griffin (1837) 2 M. & W. 623 : the wharfinger could not receive the goods for the buyer without his assent.

tion for the goods for his own purposes, will not have the effect of prolonging the transit[1].

It is open to the carrier to attorn to the buyer subject to his lien[2]. Consequently, it follows that the mere fact of retaining the lien is not conclusive against the factum of attornment[3].

The word "destination" in this sub-section has a local signification. The "appointed destination" is the place to which *under the contract* the goods are to be consigned[4]; the "further destination" is the place to which the buyer intends for his own purposes that the goods shall go, and with which the seller has no concern[5].

It may be observed that the mere arrival of the goods at the appointed destination is not sufficient to end the transit, but there must be a delivery of the goods either to the buyer or his agent to take delivery; or else the carrier must attorn to the buyer or his agent[6]. In *Jobson* v. *Eppenheim*[7] transit was considered to be at an end when the goods were received by the buyer's agent at the place where the buyer asked them to be sent though they were destined for a further destination.

Sub-section (4)—goods rejected by the buyer.

If the buyer refuses to take the goods, they remain in the possession of the carrier as such[8], and are therefore still in course of transit[9]. But if the rejection is made after the buyer's agent has taken possession of them, it will not prolong the transit[10]. The buyer's rejection does not amount to a fraudulent preference of the seller within the meaning of the law of bankruptcy[11]. In *Bolton* v. *L. & Y. Ry. Co.*[12] the buyer after accepting part of the goods rejected the rest when tendered and ordered them to be returned. The seller refused to take them back and ordered them back to the buyer who again refused to take them, and then the buyer became bankrupt when the seller stopped the goods in the hands of the carrier. Held, transit did not end.

Sub-section (5)—ship chartered by buyer.

Whether a vessel chartered by the buyer is to be considered his own ship, depends on the nature of the charter-party. If the charterer is in the language of the law merchant, owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain so that the captain is his servant, then a delivery on board of such a ship would be a delivery to the buyer;

1 Exparte Cooper, (1879) 11 Ch. D. 68; Taylor v. G. E. Ry. Co. (1901) 17 T. L. R. 394; assent implied.
2 Allan v. Gripper, (1832) 149 E.R. 94, 37 R.R. 682.
3 Kemp v. Falk, supra.
4 Per cur in Mechan v. N. E. Ry. Co. (1911) S.C. 1348: appointed destination was not the arrival station but the buyer's yard, that being the agreed place where delivery was to be given.
5 Benjamin on Sale, 7th Edn., p. 948.
6 See Bethell v. Clark, supra; Babuji v. Clan Line Steamer (1910) 34 Bom. 640: transit may not at an end by the arrival of the goods at the shipping station.
7 (1905) 21 T.L.R. 468. See also Ex-parte Golding (1880) 13 Ch. D. 628.
8 James v. Griffin, supra.
9 Bolton v. Lancashire & Yorkshire Ry. Co., L. R. 1 C. P. 431; 35 L. J. C. P. 137.
10 Jobson v. Eppenheim, (1905) 21 T. L. R. 468.
11 Re McLaren, Exparte Cooper, supra, per Brett, L. J. at p. 73.
12 (1866) L. R. I, C. P. 431.

but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the seller of goods on board is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be determined by the terms of the charterparty[1].

In *Berndtson* v. *Strang*[2] the buyer had sent a chartered vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f.o.b.), and the seller took a bill of lading, deliverable to "order or assigns," and indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held that the effect of taking the bill of lading in that form from the master of the chartered ship was to interpose him, as a carrier, between the seller and the buyer, and to preserve the right of stoppage to the former.

In *Schotmans* v *Lancashire and Yorkshire Ry. Co*[3]., the goods were delivered on board a ship belonging to the buyer, which was employed as a general trader. By the bills of lading the goods were deliverable to the buyer or his assigns. This was held to be a delivery to the buyer, so as to preclude the right to stop in transit before the arrival of the goods at the port of consignment.

Before a bill of lading is taken the seller preserves his lien if he has taken or demanded the receipts for the goods in his own name, though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage[4]. If, however, the vessel were the purchaser's own vessel, and he has paid for the goods and received the bill of lading, and the receipt contained nothing to show that a bill of lading was to be delivered by which the seller's control over the goods was to be retained, the seller's retention of the receipt would be wrongful, the principle in *Schotsman* v. *L. and Y. Ry. Co. supra* would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage[5].

The same principles as in the case of a vessel apply to the seller's or buyer's hired vehicles[6].

Sub-section (6) – wrongful refusal by carrier to deliver.

Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end. This sub-section is based on the decision in *Bird* v. *Brown*[7]. It assumes that the buyer is entitled to obtain delivery, and the proper inference is that if the carrier rightfully refuses delivery, the transit is not deemed to be at an end. And where the carrier or other bailee rightfully refuses to deliver the

1 Benjamin on Sale, 7th Edn., p. 982 and the authorities cited thereunder.
2 (1867) L.R.4 Eq. 481; 36 L. J. Ch. 879.
3 L. R. 2 Ch. App. 332.
4 Craven v. Ryder (1816), 6 Taunt. 433; 16 R. R. 644; Buck v. Hatifield (1822), 5 B. & Ald. 632; 24 R. R. 507.
5 Cowasjee v. Thompson (1845), 5 Moo P. C. C. 165; 70 R. R. 27; See Benjamin on Sale, 7th Edn. p. 988.
6 Halsbury Laws of England 2nd Edn., Vol. XXIX. p. 175; f. n. (q).
7 (1850) 154 E. R. 1433; 80 R. R. 775.

goods to the buyer or his agent in that behalf, the transit is not deemed to be at an end. In this case there was a tortious taking possession of the goods by the buyer from the carrier who refused to deliver as he was served by the seller with a notice which however was invalid. Held, the transit did not end,[1]

It has been observed[2] that the language of sub-section (6) is wide enough to cover the case of a refusal to deliver the goods on a demand made before the arrival of the goods at their destination, a demand which a consignee is competent to make. But the carrier will be entitled to demand his full freight. In *Jackson* v. *Nichol*[3] (carrier's wrongful refusal to deliver on tender of freight), however, a demand of goods before the end of the journey was held to be insufficient to terminate the transit, there being no actual delivery and no attornment by the carrier, but it has been observed that it is doubtful whether this case is good law[4].

Sub-section (7)—effect of part delivery.

Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods. Section 48, *ante*, contains the analogous provision with regard to the unpaid seller's lien.

The agreement to give up possession referred to in the sub-section, would appear to be an agreement between the buyer or his agent on the one hand, and the carrier, on the other, and not one between the buyer or his agent and the seller[5]. It rests with the party who relies on the part delivery as a constructive delivery of the whole to prove an intention to that effect. This proof may be established: (1) from the circumstances under which the delivery took place—*e.g.*, the purchaser may at the time with the carrier's consent expresses his intention to take the whole of the goods, although he actually takes only a part; or may with such consent, take part expressly in the name of the whole; or an intention to take all may be inferred from the character in which the person takes part delivery, as where he is the buyer's assignee for his creditors—or (2) from the intrinsic nature of the goods delivered—as *e.g.*, where the cargo consists of an entire machine, and an essential portion of it is delivered to the purchaser[6].

The fact that the carrier retains his lien for the freight of the goods is relevant to show that a part delivery is not intended to be a constructive delivery of the whole,[7] but it is not conclusive.

If goods are sent partly by one route and partly by another, and one parcel reaches the buyer, and the other is stopped before it

1 See also London & N. W. Ry. Co. v. Bartlett (1861) 7 H. & N. 400; 268: demand made before the arrival of the goods.

2 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 173 f. n. (h).

3 5 Bing. N. C. 508; 8 L. J. C. P. 294; 50 R. R. 777.

4 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 173 f. n. (h).

5 Re MacLaren, Exparte Cooper (1879) 11 Ch. D. 68 C. A., at p. 78.

6 Benjamin on Sale, 7th Edn., p. 950; See also notes under section 48, ante.

7 Re McLaren, Exparte Cooper, supra; Kemp v. Falk, supra.

does so, the seller can hold the part successfully stopped until the price of the whole is paid[1].

Public wharves.

In *Lilladhar* v. *George Wreford*[2] Farran, J. considered the effect of lading goods at wharves belonging to public bodies like the Trustees of the Port of Bombay, constituted by Bombay Act VI of 1879, and after citing *Barber* v. *Meyerstein*[3] and *Glyn Mills & Co.*, v. *East and West India Dock Co.*[4], observed: "From this it would seem to follow that so long as (the goods) are subject to a lien for freight, the transit is not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the shipowner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforward the goods are held by the statutable wharfingers for the consignee alone."

How stoppage in transit is effected

52. (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such redelivery shall be borne by the seller.

How stoppage in transit effected.

This section is based on section 46 of the English Sale of Goods Act, 1893 (See Appendix A). The rules contained in that section correspond to old sections 104 and 105 of the Indian Contract Act, 1872 (See Appendix B).

This section mentions two modes of stoppage, namely, (1) actual possession of the goods by the unpaid seller; (2) notice by him of his claim to the carrier or other bailee in whose possession the goods are. It has been suggested, with reference to the English Act, that the use of the word "may" indicates that the section is not exhaustive.[5]

1 Wentworth v. Outhwaite (1842) 10 M. & W., 436, 62 R R. 664. See also notes under section 54.

2 (1892) 17 Bom. 62, at pp. 91—92.

3 (1870) L. R. 4 H. L. 317.

4 (1882) 7 App. Cas. 591.

5 See Halsbury, Laws of England, 2nd Edn, Vol. XXIX, page 176, f. n. (g).

"At one time it seems to have been supposed," wrote Lord Blackburn, "that in order to make a good stoppage *in transitu* there must have been an actual taking possession of the goods by the vendor or his agent, but it is now clearly settled that the vendor's rights are complete on giving the person who has the possession of the goods notice of the vendor's claim to stop the goods at a time when he can obey it, although there is neither an actual taking of possession by the person stopping the goods, nor such an assent on the part of the holder as would amount to a constructive possession.[1]"

No particular form of notice is prescribed by the Act and it need not be in writing. It may be given to the carrier etc. or his agent.[2] The usual mode is a simple notice to the carrier stating the seller's claim, forbidding delivery to the buyer, or requiring that the goods shall be held subject to the seller's orders. But the seller need not prove his title to the carrier, that is to say, the existence of facts justifying a stoppage. He takes the risk of the stoppage being justified[3]. The carrier or other bailee in possession of the goods is bound to give effect to the claim as soon as he is satisfied that it is made by the seller unless he is aware of the lagal defeasance of the claim.

So where a seller sent two telegrams, namely 'dont-deliver' and 'deliver' to a third man and in subsequent letter stated that delivery ought to be made to a third party but made no mention of his claim as that of an unpaid seller, it was held that the telegrams were a sufficient notice under section 104 of the Indian Contract Act, 1872, and that the intention of the telegrams was to stop the goods in transit.[4]

The stoppage must be intended as such, and in virtue of a right adverse to that of the buyer and must, be done by an act showing an intention to resume possession, though the act may in fact be done with the buyer's consent. Thus, a direction by the seller to the consignee to hold the proceeds of the goods to his order is not a valid stoppage (assuming a valid notice conld be directed to the consignee), as it implies that the goods themselves will be delivered to the buyer. but is only a direction how the proceeds shall be dealt with after delivery[5]. Where the stoppage is effected on behalf of the seller by one who has no authority to act for him, a subsequent ratification by the seller will be too late, if made after the transit is ended, the principle of the law of agency being that a ratification to be valid mut be made at a time and in circumstances in which the person ratifying could himself do the act ratified.[6]

It is not stated how the unpaid seller is to take possession of the goods in transit. but it would seem that the seller would be

1 Blackburn on Sale, 1st edition (1845), p. 267.

2 Bohtlink v. Inglis (1803) 3 East. 381: notice by seller's agent to the master of the ship was held sufficient.

3 The Tigress (1863), Br. & Lush, 38.

4 Raghumal v. Michumal, 8 Sind L.R. 65: 96 I.C. 424.

5 Phelps v. Comber (1885) 29 Ch. D. 813, C. A.; See also Liladhar v. Wreford, 17 Bom. 62.

6 See Dibbins v. Dibbins (1896) 2 Ch. 348; per curiam in Lyall v. Kennedy (1889) 14 App. Cas. 437, 461, 463; See Bird v. Brown supra; but see Hutchings v. Nunes (1863) 1 Moo. P. C. (N. S.) 243; 138 R. R. 511; cf. section 200, Indian Contract Act, 1872.

justified in getting his goods back by any means not criminal, before they reached the possession of an insolvent buyer.[1]

Notice to principal.

Sub-section (1) further lays down that notice by the unpaid seller of his claim to the carrier or other bailee in whose possession the goods are, may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

Where the transit is by sea, the expression 'principal' includes the shipowner, who is the person most likely to know where the ship and its master are to be found. On this point Lord Blackburn observed in *Kemp* v. *Falk*:[2]

> "I had always myself understood that the law was that when you become aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them *in transitu* was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that, although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage if effected thus, was a sufficient stoppage *in transitu*. I have always thought that when shipowner, havivg received such a notice, used reasonable diligenee and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage *in transitu*."

Notice to be effectual must be so given that the principal can by the exercise of due diligence communicate with his servant or agent. "The only duty that can be imposed on the absent principal is to use reasonable diligence to present the delivery[3]." So, where notice was given to the shipowner and he endeavoured to stop the goods but the assignees of the bankrupt obtained delivery before the communication could reach the person in actual possession, it was held that the notice was ineffectual.[4] But where notice to the principal is given in time and under the circumstances giving the principal sufficient opportunity to communicate with the agent in actual possession if he had acted with due diligence, the mere fact that the principal failed to communicate with the agent in time to stop delivery will not destroy the seller's right and in such case if the seller cannot be restored in possession of the goods he is entitled to claim damages from the principal for the loss due to his negligence.[5]

The sub-section also implies that it is the duty of the principal to use such diligence, and if the principal took no steps to communicate with his agent when it was open to him to do so, he would be liable to the seller for a breach of the obligations imposed upon the carrier by the next sub-section[6].

1 Snee v. Prescot (1744) 1 Atk. 245, at p. 250; per Lord Hardwicke L. C.; 26 E. R. 157, L. C.
2 7 App. Cas., at p. 585.
3 Per Parke B, in Whitehead v. Anderson (1842) 9 M. & W. 518, 534, 60 R. R. 819, 832.
4 Ibid.
5 Liladhar v. Wreford, 17 Bom. 62 (89) Remfry, p. 398.
6 See Litt v. Cowley (1816) 7 Taunt. 169, 17 R. R. 482.

It has been held that the unpaid seller may effectually exercise his right of stoppage by demanding the bills of lading from the Shipowner who has retained them as security for unpaid freight[1]. A request by telegram may also be sufficient.[2]

It appears doubtful whether a notice to the consignee or to his official assignee in case he is already declared insolvent, is sufficient for the purposes of the section[3].

Sub-section (2)—effect of notice—duties of the carrier and the seller.

The effect of the notice to stop in transit when given effectually, whether to the person in actual possession of the goods or his principal, is to revert the right to the *possession*[4] of the goods in the seller. After that the carrier holds them as his agent, and, subject to the carrier's lien on the goods for their freight, which arises from the common law, whether the carrier be a carrier by land or sea, and prevails against the rights of the seller as well as those of the consignee, he must deliver them as the seller directs. If after receiving such notice the carrier delivers the goods to the consignee, or refuses to re-deliver them to the seller, he is guilty of a conversion of the goods and is liable for damages[5].

Similarly, if by mistake, or by reason of the principal not using due diligence to communicate with his agent to stop the delivery, the goods are delivered to the buyer, the carrier is liable for damages for conversion, and the buyer or his trustee in bankruptcy must restore them on demand to the seller, and on his failing to do so, is also liable to be sued in trover by the seller[6]. In case of doubt the safest course for the carrier is to file a suit of inter-pleader[7], or take an indemnity from the person to whom he delivers the goods, as he would render himself liable to an action by the buyer for conversion if he restores the goods to the seller after the transit has ended[8].

Where a railway company is in possession of goods as carriers when the sellers give notice of stoppage in transit, and a sum of money is owing by the buyers to the railway company, the railway is not entitled to set up in priority to the seller's right of stoppage in transit a generel lien exercisable by the company against the buyers as owners of the goods.[9]

1 Exparte Watson (1877) 5 Ch. D. 35, C. A.

2 Exparte Falke (1880) 14 Ch. D. 446; Rajhumal v. Michumal (1915) 26 I. C. 424 (Sind).

3 (cf.) Phelps Sotkes & Co. v. Comber (1885) 29 Ch. Div. 813, 822, 825, C. A.; Lilladhar v. Ureford, 17 Bom. 62.

4 Not "the property" as stated in some of the older cases.

5 The Tigress (1863) 32 L. J. Adm 27, at p. 102; United States Steel Products Co. v. G. W. Ry. Supra; Pontifex v. Midland Rail Co. (1877) 3 Q. B. D. 23; Ormonde v. Bailey (1895) 11 T. L. R. 219.

6 Litt v. Cowley 2 Marsh 457; 7 Taunt. 169; 17 R.R 482, cited in Lilladhar v. George Wreford (1892) 17 Bom. 62; Re Deveze, exparte code (1873) L R. 9 Ch. App. 27.

7 The Tigress, supra: Chhangan Lal v. B.B.C.I. Ry. (1915) 17 Bom. L.R. 899 = 23 I.C. 948 (2); Amer Chand v. Ram Das (1914) 38 Bom. 255 = 21 I C. 843: Meyerstein v. Barber (1866) L. R. 2 C. P. at p. 55; Glyn v. East and West India Dock Co. (1882) 7 A.C. 591.

8 Taylor v. G. E. Ry. (1901) 1 K.B. 774.

9 U. S. Steel Products Co. v. G. W. R. (1916) I.A.C. 189.

The seller may also enforce his rights by injunction, or if the goods are in the hands of the master, by arrest of the ship.[1] The seller has a preferential right against a creditor of the buyer who has attached the goods during transit.[2]

A seller who stops in transit, and persists in the stoppage, is under an obligation to the carrier to take, or give directions as to the delivery of the goods and to discharge the freight; and if he repudiates this obligation he is responsible to the carrier in damages for any loss incurred by the latter by reason of the non-completion of the transit. These damages will if the conduct of the seller prevents the goods going to their ultimate destination amount to the whole freight of the voyage to that destination, which would otherwise have been completed[3].

If the notice be given to the principal, but not so as to enable him by the use of due diligence to stop the delivery to the buyer by his agent, neither he nor the agent will be liable to the seller, and the buyer will have lawfully obtained possession, and the transit will have come to an end. This follows from the previous sub-section[4].

This sub-section also provides that as between the seller and the carrier the expenses of re-delivery shall fall on the seller. Where an unpaid seller stops goods sent by sea at a port short of their destination, he is liable for the freight, not only to the port where the goods were actually landed, but also to the port of their ultimate destination[5]. It may be that the seller would be able to prove for the expenses against the buyer's estate in insolvency[6].

Stoppage by unauthorised person.

A stoppage in transit made on account of the seller even by a person unauthorised in that behalf is effectual, if it is ratified before the transit has terminated[7]. But as under the general law of agency a ratification is not effectual unless it is made at the time when the principal could himself do the act ratified, it cannot be ratified after the transit has terminated.[8] In the latter cases another principle of the law of agency, namely a ratification cannot prejudice a third person's vested rights, also comes into play and makes the act of the unauthorised person ineffectual[9]. The despatch during the transit by the seller to the person making the stoppage in transit of a letter of authority is however, held to be sufficient ratification notwithstanding that the letter may not be received by the unauthorised agent until after the termination of the transit[10].

1 The Tigress, supra.
2 Smith v. Goss (1808) 1 Camp 282.
3 Booth Steamship Co. v. Cargo Fleet Iron Co. (1916) 2 K.B. 570; 85 L.J.K.B. 1577 (C.A.); See also Benjamin on Sale, 7th Edn., p. 956.
4 See also Whitehead v. Anderson, supra.
5 Booth S.S. Co. v. Cargo Fleet Iron Co., Ltd. Supra.
6 See Chalmers, Sale of Goods Act, 11th Edn., p. 122.
7 See Bird v. Brown, 4 Exch. 786; Aggarwala's Law of Agency, p. 479.
8 Bird v. Brown, supra.
9 See Aggarwala's Law of Agency, p. 273 284.
10 Hutchings v. Nunes, I. Moo. P. C. C. (N.S.) 243; Halsbury, Vol. XXV (1st Edn.) Art 458.

Transfer by Buyer and Seller.

Effect of sub-sale or pledge by buyer.

53. (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Analogous law.

Sub-section (1) is based on section 47 of the English Sale of Goods Act, 1893 (Appendix A). It combines the provisions of old section 98 and 101 of the Indian Contract Act, 1872, while the proviso covers the same ground as section 102 and 103 of that Act (Appendix B). The words in section 102 "having obtained" were unsatisfactory as they would include cases where the document is got tortiously. Consequently, the language of the English Act "lawfully transferred" was substituted, Again. to make the proviso applicable to warrants and delivery orders, the word "issued" was added.

Sub-section (2) is new. It introduces the right of marshalling by an unpaid seller in cases of pledge of other securities along with documents of title by the buyer.

Sub-section (1)—effect of sub-sale by buyer—seller's rights not affected by the buyer's dealing with the goods.

As already explained[1], an assent by the seller to a sub-sale or pledge is a renunciation of the seller's rights of *lien* as against the sub-buyer or pledgee; and on principle, it would be reasonable that a seller should, after such an assent, be able by a subsequent stoppage to resume a lien which he had parted with absolutely.

See also Benjamin on Sale, 7th Edn., pp. 908 and 960.

The rule presupposes that the sub-sale is made while the goods are still in transit; if the transit is at an end as regards the buyer, there cannot be a new transit with regard to the sub-purchaser.

A sub-purchaser cannot be in a better position than that of the purchaser himself unless there is assent or estoppel on the part of the seller. The assent is to the sale or other disposition of the property and may be express or implied. The section deals with both lien and stoppage in transit.

In *Merchant Banking Co.* v. *Phoenix Bessemer Steel Co.*[1] the sellers had, by issuing to the buyers a warrant which was by custom treated as a representation that the goods were free from any seller's lien, assented to the buyers dealing with the goods. Part of the goods, at the time of the buyer's insolvency, were still at the seller's works, and part had been sent by rail and warehoused by the railway company in the name of the buyer's agents. The sellers gave the railway company notice not to deliver the goods. The indorsees of the warrant claimed a charge on all the goods. *Held*, that the sellers, after issuing the warrant, could not set up any claim for unpaid purchase-money. Jessel M. R. observed in this case:

"Any man who gives this warrant understands that it shall pass from hand to hand for value by indorsement, and that the endorsee is to have the goods free from *any* vendor's claim for purchase-money. He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape he tells all the trade *that they may safely deal on the faith of that warrant*............ Having given it as a statement on the face of the warrant that the holder for value by indorsement would have the goods free from the lien, and having given the warrant for the purpose of its being so dealt with, I think it is clear on general principles of eqity that such a defence (that the sellers were unpaid) could not be set up."

In this statement of the common law, Jessel M. R., seems to have made no distinction between lien and right of stoppage *in trasitu*, for he proceeds to consider, only on the supposition that his view was wrong, whether the *transit* of the goods was at an end, and he held that it was. This view of the law is adopted by the English Act[2].

Lord Blackburn stated the rule as follows:—

A purchaser who has acquired ownership "may sell the goods subject to the first vendor's rights, and, if he does so. the property is transferred to the second purchaser by the second bargain and sale without any delivery of possession. But though the second purchaser acquires by his bargain and sale the legal property in the goods and every right which his immediate bargainer had in the goods, yet (if there be not an assignment of the bill of lading) he acquires no greater right; he takes the property subject to the same restrictions that his immediate vendor held it under".[3]

The above statement must, however, be read with the proviso to sub-section (1).

Thus a buyer cannot defeat the unpaid seller's rights of lien or stoppage in transit by selling or otherwise disposing of the goods, unless the seller has assented to such disposition.[4] As a general

Assent by seller

1 5 Ch. D. 205; 46 L.J. Ch. 418.
2 See Benjamin on sale, 7th Edn., p. 961.
3 Blackburn on Sale, 2nd Edn., p. 386.
4 Craven v. Ryder (1816) 6 Taunt 433; 16 R.R. 644; Dixon v. Yates (1833) 5 B. & Ad. 313; 39 R.R. 489; Ewan v. Smith (1849) 2 H.L.C. 309; 81 R.R. 166; cf. old section 98, Indian Contract Act, 1872.

rule, the buyer who resells the goods cannot give a better title than he himself has. The subsequent vendee who does not take possession gets only a title defeasible on non-payment of the price by the first vendee[1]. A mere acknowledgment by the seller of the buyer's sub-contract does not deprive him of the rights of lien and stoppage in transit; for it is quite consistent with the seller thinking that neither the first nor the second buyer will be entitled to delivery unless the price is paid. Pickford J. observed in *Mordaunt* v. *British Oil Cake Mills*[2]:

"The assent which affects the unpaid vendor's right of lien must be such an assent as in the circumstances shows that the seller intends to renounce his right against the goods. It is not enough to show that the fact of a sub-contract has been brought to his notice, and that he has assented to it merely in the sense of acknowledging the receipt of the information............His assent to a sub-contract may simply mean that he acknowledged the right of the purchaser under the sub-contract to have the goods, subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase money............"

Estoppel

Where, however, the seller by his conduct assures the subsequent buyer that the goods are at his disposal free from any adverse claim by the seller, he is estopped[3]. The rule has nothing to do with constructive delivery. The seller is deemed to assent where by his words or conduct he expressly or impliedly represents to the transferee from the buyer that goods will be delivered to him free from the seller's rights of lien and stoppage in transit[4].

In *Knights* v. *Wiffen*,[5] the defendants sold 80 maunds of barley out of a granary to M who sold 60 maunds to the plaintiffs before the goods had been ascertained by the defendant. The plaintiff paid M, obtained and presented a delivery order to the defendant, who expressed willingness to forward the barley on being requested to do so. It was held that the seller had recognised the title of the sub-buyer and therefore was estopped from exercising the lien which he had waived.

In *Ganges Manufacturing Co.* v. *Sourujmull*,[6] where the sub-buyer produced delivery orders to the sellers who endorsed on them that they were willing to give delivery, but after delivery of part refused to deliver the rest on the ground that the first buyer had not paid the price, it was held that the sellers were estopped.

To affect the lien the assent must be given in such circumstances as to show an intention on the part of the unpaid seller to renounce his right against the goods sold by the buyer. In *Mordaunt Brothers* v. *The British Oil and Cake Mills Ltd*[7], the defendant sold a quantity of oil to some merchants, who resold a portion to the plaintiffs, giving them delivery orders addressed to the defendants

1 Dixon v. Yates, supra; Craven v. Ryder, supra.
2 (1910) 2 K.B. 502; see also Stoveld v. Hughes, (1811) 104 E.R. 619; 12 R.R. 523.
3 See Pollock and Mulla's Indian Contract Act.
4 See Merchant Banking Co. v. Phoenix Bessemer Co. (1877) 5 Ch. D. 205; Knights v. Wiffen, (1870) 5 Q.B. 660; Pearson v. Dawson (1858) 120 E.R. 576, 113 R.R. 724; Stoneld v. Hughes, supra.
5 (1870) 5 Q.B. 660.
6 (1880) 5 Cal. 669; See also Anglo India Jute Mills Co. v. Omademull (1910) 38 Cal. 127.
7 (1910) 2 K.B. 502.

requiring the latter to deliver to the plaintiffs "*ex* our contract." The defendants retained the orders when presented, and either made no comments when doing so, or told the plaintiffs that they were in order, and entered the plaintiffs' names in their books. The merchants, who bought from the defendants, at first kept up their payments, and the defendants duly delivered the oil to the plaintiffs. Later the merchants fell into arrears with their payments and thereupon the defendants, claiming to exercise their right of lien, refused to make further deliveries to plaintiffs. It was held that the defendants were entitled to do so.

Even at common law, if the original seller recognizes the title of a subsequent buyer without reserving his own rights, he is estopped from claiming a lien[1]; and a sub-sale may even take effect by way of estoppel, notwithstanding that no specified goods had been appropriated as between the seller and the first buyer, though it may be more difficult to establish that it is when the goods are specific[2].

Proviso to sub-section (1)—transfer of documents of title.

The usual way in which in seller's right of stoppage *in transitu* was at common law defeasible was when the goods are represented by a bill of lading, which is a symbol of property, and when the buyer, being in possession of the bill of lading with the seller's assent transfers it to a third person, who *bona fide* gives value for it. But it is necessary that there should be a transfer by the *buyer* of the bill of lading- Thus, the right of stoppage was not at common law, *and is not now* affected by a transfer of the bill of lading by the seller to the buyer, or by the fact that it is issued in the first instance by the carrier to the buyer, or at any rate without the privity of the seller to a sub-buyer[3]. The existance of a bill of lading made out in the sub-purchaser's name but not delivered to him is not sufficient[4]. Neither is any kind of agreement with the sub-purchaser, even for payment, unaccompanied by endorsement of the bill of lading[5].

All documents of title have now been placed on the same footing by the Factors Act of 1889, which repealed the Factors Act, 1877.

As an exception to the rule laid down in sub-section (1) of section 53 of the Act, the *proviso* to the said section lays down that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in

Knights v. Wiffen, supra; see also Woodley v. Caventry (1863) 2 H. & C. 164, 133 R.R. 633, Compare Pearson v. Dawson (1858) E.B. & E. 448, 113 R.R. 724.

See Farmeloe v Baix (1876) C.P.D. 445; Mordaunt Brothers v. British Oil and Cake Mills, Ltd., supra.

Benjamin on Sale, 7th Edn., pp. 961, 962 and the authorities cited therein.

Ex parte Golding, Davis & Co. (1880) 13 Ch. Div. 628, C.A.; Bapuji Sorabji v. The Clan Line Steamers (1910) 34 Bom. 640=7 I.C. 659; Aliter, if the bill of lading is actually delivered to the sub-purchaser in whose name it has been made out. Ramendra Nath Roy v. Brajendra Nath Das (1919) 46 Cal. 831=53 I.C. 986.

Kemp v. Falk, supra. "No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an endorsement of the bill of lading" - per Lord Blackburn at p. 582.

transit is defeated, and, if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.' He has still the right to stop all the property which remains in the buyer, but he must either pay the mortgagee or pledgee the amount secured by the mortgage or pledge, or content himself with receiving any surplus realized by the sale of the goods over the amount so secured. The expression "document of title to goods" is defined in section 2 (4), *ante*. It includes warrants and orders for the delivery of goods, which are really *issued* and not transferred. The word "issued" (which does not occur in English Act) has, therefore, been inserted before the words "lawfully transferred" in the proviso[1].

The document must be lawfully transferred

The document of title to goods must be "lawfully transferred." It must be transferred in the manner appropriate to the instrument, as by indorsement and delivery or by mere delivery, as the case may be. The transferor, as held under the English law, should also have a right to transfer it, for even a bill of lading, and *a fortiori* any other document of title, is not negotiable in the same sense as a bill of exchange, and therefore the mere honest *possession* of a bill of lading indorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The indorsement of a bill of lading gives no better right to the goods than the indorser himself had (except in cases where a mercantile agent, or person in the position of such agent, may transfer it to a *bona fide* holder under the Factors Act), so that if the owner should lose or have stolen from him a bill of lading indorsed in blank, the finder or the thief could confer no title upon an innocent third person[2].

But the title of *bona fide* third persons will prevail against the seller who has *actually* transferred the bill of lading to the buyer, although he may have been induced by the buyer's fraud to do so, a transfer obtained by fraud being only voidable not void[3].

Good faith

The transfer of the document of title to goods, in order to affect the sellers's right of stoppage in transit or of lien must be to a third person who takes it in good faith. 'Good faith' means without notice of such circumstances as render the document of title to goods *not fairly and honestly assignable*[4] *e.g.* that the buyer is insolvent. Knowledge that the goods are still unpaid for does not constitute bad faith[5] and is not sufficient by itself to present the assignee from defeating the seller's right to stop. This section assumes that the buyer is properly in possession of the bill of lading or other document of title. Section 30 (2), *ante*, governs the cases in which he has

1. See Report of Special Committee, note on clause 53 of the Bill.
2. Benjamin on Sale, 7th Edn., pp. 964, & 965 and the authorities cited therein; See also Gurney v. Behrend (1854), 3 E. & B. 622; Cahn v. Packett (1899) 1 Q.B. 648.
3. Pease v. Gloahec (1866) L.R. 1 P.C. 219: where the buyer obtained the bill of lading fraudulently the assignee was held not affected. For position in India, see section 20 (3) ante.
4. Cuming v. Brown (1808), 9 East, 506; 9 R.R. 608; Salomons v. Nissen (1788), 2 T.R. 674. See also S. 3 (20) of the General Clauses Act, 1897.
5. Cuming v. Brown, supra; Vertue v. Jewell (1814) 4 Camp. 31.

obtained or retained possession of it fraudulently. The second buyer must have no notice of that defect in the buyer's title. If he has no such notice, his position is the same as under this section.

The burden of proving that the transfer was made in good faith and for consideration lies on the subseqent buyer[1].

As has been stated before, a bill of lading or a document of title is not a negotiable instrument, but the transferee can acquire a better title than that of the transferor if he takes *bona fide* and for value as the seller's right of lien or stoppage in transit is not available against him though it may be available against the transferor.

In *Cahn* v. *Pockett's Bristol etc. Co.*,[2] the seller forwarded to the buyer a bill of lading endorsed in blank together with a draft for the price of the goods for acceptance. The buyer without accepting the draft made over the bill of lading to a sub-purchaser who acting in good faith paid him for the goods. The seller thereafter stopped the goods in transit. In an action by the sub-purchaser against the carrier for non-delivery it was held that the seller had lost his right of stopping the goods in transit.

It is to be noted that under the section the seller's right is defeated against a transferor who takes in good faith and for consideration, and though in the case of pledge the right is to be exercised subject to the right of the pledgee, in the case of assignment by way of sale there is no reservation as to payment of consideration or any part of it.

Transfer must be for value. Under old section 103, Indian Contract Act, which was based on a decision of the Judicial Committee in *Rodger* v. *Comptoird' Escompte de Paris*[3], an antecedent debt of the buyer to the second buyer was not sufficient consideration for the transfer of a document of title. But in *Leask* v. *Scott*[4] this opinion was dissented from, and the present section being based on section 47 of the English Act makes no distinction between an 'antecedent debt' and an advance made specially on the document transferred. Consideration-antecedent debt

But, although an antecedent debt may be the basis of a good consideration for the transfer of a document of title, yet to defeat the unpaid seller's rights, the facts connected with the transfer must show that it was *agreed* that such debt should be the consideration. Thus the transfer will be ineffectual if the transfer be unknown to the transferee[5]. And the pledgee of a bill of lading specifically for a definite sum does not entitle the pledgee to hold the goods against the seller *also* in respect of the pledgee's general balance of account . against the buyer, even although the pledgee be the buyer's factor[6].

Rash Behari v. Narain Das, A.I.R. 1923 Cal. 182=50 Cal. 899; See also Lakshmi Kanta v Emperor (1919) 46 Cal. 825 = 50 I.C. 669.

(1899) 1 Q B. 643. The case was decided on S. 25 (2) of the English Act which corresponds to S. 30 (2) of the Indian Act but the decision also illustrates the present section.

3 (1869) 2 P.C. 393.

4 (1877) 2 Q.B.D. 376; (cf.) Glegg v. Bromley (1912) 3 K.B. 474.

5 Glegg v. Bromley supra; Wigan v. English Ass. Corp. (1909) 1 Ch. 291.

6 Spalding v: Ruding (1843) 6 Beav. 376, 12 L.J. Ch. 503. 63 R.R. 120; See also Peacock v. Baijnath (1891) 18 Cal. 573, 590, 591.

In *Patten* v. *Thompson*,[1] the buyers were in the habit of consigning goods to their foctors for sale, and the factors used to accept bills drawn by the buyers in respect of a general account between them. The buyers indorsed to these factors a bill of lading received from the sellers, and representing goods of less value than the acceptances of the factors then current, but they made no appropriation of the bill of lading to any specific draft or balance. *Held*, that on the buyer's insolvency the seller's right of stoppage had not been defeated by the indorsement of the bill of lading, as it was transferred to the factors without reference to any balance due to them, and therefore to them not as pledgees, but to enable them to obtain possession of the cargo *qua* factors only.

It would appear that the proviso will include the case of a transfer of the bill of lading to a second buyer where the sale is on credit and the term of credit has not expired[2].

If the holder of the bill of lading resells the goods or otherwise disposes of them for value to a third peson. who pays the money, such third person acquires his interests in the goods subject to the original seller's right of stoppage *in transitu*, unless he gets a transfer of the bill of lading.[3]

In *Exp-Golding Davis & Co.*[4] the buyer resold the goods and became insolvent; the bill of lading was made out in the name of the sub-purchaser but not delivered to him and when the goods were stopped he had not paid the price. It was held that the original seller was entitled to stop the goods for the original purchase-money. This decision was followed in *Exp. Falk*[5]. But in the House of Lords, Lord Selborne seemed to doubt the rule laid down in *Exp. Golding Davis & Co.*, saying that he assented to "the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu* as against the purchase-money payable by them to their vendors. I am bound to say that it is not consistent with the idea of the right of stoppage in transit that it should apply to anything except to the goods which are in transit." The other Lords declined to give any opinion on the point.[6]

The Bills of Lading Act, IX of 1865, has not affetced the law on these matters.

Documents of title

The document should be a document of title, that is, one which represents the goods, and not, *e. g.* a mere engagement to deliver[7].

In *Ant. Jurgens Margarine Fabrieken* v. *Louis Dreyfus & Co.* the defentants entered into a contract to sell a quantity of seed, payment to be made in London on vessel's arrival before Hamburg by cash

1 5 M. & S. 350; 17 R. R. 350.
2 See Pollock and Mulla's Sale of Goods Act, 1930, page 272.
3 Kemp v. Falk, (1882), 7 App. Cas. 573, at p. 582, per Lord Blackburn.
4 (1880), 13 Ch. D. 628, at p. 637, C.A.
5 (1880), 14 Ch. D. 446. at p. 457, C.A. See also Hugill v. Masker (1889) 22 Q.B.D. 364. 369.
6 Kemp v. Falk, supra, at p. 577; See Chalmers, Sale of Goods Act, 1893, 11th Edn., p. 124.
7 See Laurie and Morewood v. Dudin (1925) 2 K.B. 383.
8 (1914) 3 K.B. 40 cf. Anglo-India Jute Mills v. Omademull (1911) 38 Cal, 127, 10 I.C. 859.

in exchange for shipping documents and or delivery order. Subsequently the buyers sold 500 tons of the seed to the plaintiffs on the same terms as to payment. The defendants received a consignment of 6,400 bags at Hamburg, and in exchange for the buyer's cheque for the price of 2,640 bags, gave them two delivery orders to their Hamburg house for 960 and 1,680 bags respectively from that consignment. The buyers endorsed these orders to the plaintiffs in exchange for the price. The cheque given by the buyers to the defendants was dishonoured and the defendants thereupon refused to deliver any seed to the plaintiffs. It was held that this refusal was wrongful.

Delivery chit

Apart from any established trade custom a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A delivery chit which is part and parcel of a contract on Sukkur Pass Godown Delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent of the price of the goods is not a document of title within the meaning of S. 2 (4) of the Act. The delivery chit does not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller. Irrespective of whether he had received the purchase price of the goods the original seller is entitled to refuse delivery to the holder of the chit of lien as unpaid vendor. The delivery chit therefore does not fall within the purview of S. 53 (1) of the Act.[1]

Sub-section (2)—other securities—marshalling.

This sub-section is new. It gives to the unpaid seller the right to insist on the pledgee marshalling the securities. In other words, it entitles the unpaid seller to force the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding against the goods of the unpaid seller.[2] The doctrine of marshalling has been recognized in the case of sale and mortgage of immovable property in sections 56 and 81 of the Transfer of Property Act, 1882.

Sale not generally rescinded by lien or stoppage in transit

54. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and

5 Hukumat Rai Arjandas v. Nandu Viromal, A.I.R. 1941 Sind 78=195 I. C. 187.

1 See Re Westzinthus (1833) 5 B. & Ad. 817, 39 R.R. 665. See Bapuji Sorabji v. The Clan Line Steamer (1910) 34 Bom. 640, at p. 658 et seq. 7 I. C. 650.

recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

Analogous law.

This section relates to the right of re-sale of an unpaid seller, and is based on section 48 of the English Act (see Appendix A). Old section 107 of the Indian Contract Act (see Appendix B) contained a similar provision. The present section embodies the following principles:

(1) Before the seller exercises his right of re-sale, he should give notice to the buyer of his intention to re-sell.

(2) In default of such a notice, the seller should have no right to claim any damages for loss on re-sale from the buyer and should be under an obligation to pay over the profits, if any, arising from the re-sale to the purchaser.

(3) Whether or not the requisite notice is given, the purchaser from a seller should get an absolute and clear title[1].

The effect of a stoppage in transit is to restore the goods to seller's possession, not to rescind the sale generally—sub-section (1).

The rights of an unpaid seller to retain possession of the goods or, if he has parted with the possession, to resume and thereafter to retain it, and the circumstances in which these rights may be exercised, have already been dealt with. This section deals with his further rights and remedies, when in possession, against the goods.

Sub-section (1) clearly declares that the exercise by the unpaid seller of his rights of lien or stoppage in transit does not amount to rescission of the contract except to the extent provided by the other sub-sections. The rights of lien or stoppage in transit are given to the seller to enforce payment of the price : these rights cease on payment or tender of price. The property continues to be in

1 Vide Report of the Special Committee (Notes on Clauses).

the buyer, and but for the right of resale the seller would have been compelled to hold the goods indefinitely until the default on the part of the buyer amounted to a repudiation of the contract, when the seller could cancel the contract and regain the property in the goods. Sub-section (1) confirms the view held at common law also[1]

As observed by Lord Atkinson in *United States Steel Products Co.* v, *Great Western Ry. Co.*[2] "the vendor by stopping the goods *in transitu* does not thereby regain the property in them, nor does he thereby cancel the sale. In no proper sense, does he by the stoppage become the owner of the goods"

The provisions of this section also apply to the case of a person in a position analogous to that of a seller, such as a commission agent who is personally liable for the price[3]. Under the Act there is no question about it that the commission agent is entitled to the remedy given to an unpaid seller in section 45 and in section 46 unpaid seller has a right of resale as limited by the Act. Under section 54 the unpaid seller can resell after giving a due notice[4].

Buyer's insolvency

Even the buyer's insolvency does not *per se* operate as a rescission of the contract[5]. The benefit of the contract vests in the official assignee and it may still be possible and proper to complete the contract for the benefit of the creditors[6]. Conduct on the part of the insolvent and his trustee "which practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts" may, however, amount to a refusal of performance entitling the seller to rescind under section 39 of the Indian Contract Act[7]. If the seller does not elect, or is not entitled, to rescind, he has his remedy against the bankrupt buyer's estate for any damage suffered by the breach of contract[8].

The seller is not entitled to treat the buyer as insolvent merely because he is in some temporary embarrassment. It must appear by his own admission or by other sufficient proof that he is unable to pay the price due in a reasonable time, and therefore does not expect or intend to pay it[9].

Buyer's default in payment

Default in payment of the price at the due date does not of itself rescind or entitle the seller to rescind the contract. The buyer therefore may put an end to the seller's lien and entitle himself to

Greaves v. Ashlin (1813) 3 Camp. 426; Martindale v. Smith (1841) 1 Q. B. 389; Page v. Cowasjee (1866) L. R. 1 P.C. 127, at p. 145; Kemp v. Falk, (1882) 7 App. cas, 573 at p. 581; Booth S.S. Co. v. Cargo Fleet Co. (1916) 2 K B. 570.

(1916) 1 A.C. 189; See also Jainarain v. Narain A.I.R. 1922 Lah. 369=3 Lah. 296=69 I.C. 583.

See Section 45 (2); Harilal Chimanlal v. Pelbadrai & Co. A.I.R. 1929 Bom. 260=(1929) 31 Bom. L.R. 508=120 I.C. 337.

Jagram Das v. Banarsi Das, A.I.R. 1936 Oudh 308=162 I.C. 745.

5 cf. sec. 38 and the notes thereunder.

6 Ex parte Chalmers (1873) L.R. 8 Ch. App. 289, 294; Jaffer Mehr Ali v. Budge Jute Mills Co. (1906) 34 Cal. 289.

7 Ex parte Chalmers, supra, at pp. 293, 294 Morgan v. Bain (1874) L.R. 10 C.P. 15, 27, per Brett. J.; Jiwan Vurjung v. Haji Osman Haji Oomar (1903) 5 Bom. L.R. 373.

8 Boorman v. Nash (1829) 9 B. & C. 145, 32 R.R. 607.

9 Re Phoenix Bessemer Steel Co. (1876) 4 Ch. D. 108, C.A.

delivery by payment or tender of the price within a reasonable time[1].

Unpaid seller's right of re-sale—sub-section (2)—effect of re-sale.

As already observed, the mere fact that the buyer has failed to pay, or is insolvent, and the goods have been stopped in transit, does not entitle the seller to rescind the contract. The unpaid seller, though in possession of the goods, has not the right merely because he is unpaid to resume a complete right of property, so as to divest totally the buyer's right of property in the goods. Still less has he the right to do so by retaking them out of the buyer's possession after delivery. This is an actionable trespass and the buyer can recover the full value of the goods as damages, though it does not preclude the seller from suing, or counterclaiming for the price, for the tort of the seller does not rescind the contract[2].

What is then a seller to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods be perishable, like a cargo of fruit, or expensive to keep, as cattle or horses?

Sub-section (2) provides that where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a *reasonable* time pay or tender the price, re-sell the goods within a *reasonable* time and recover from the original buyer damages for any loss occasioned by his breach of contract. The buyer is not entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller is not entitled to recover such damages and the buyer is entitled to the profits, if any, on the re-sale.

Sub-section (3) of section 48 the English Sale of Goods Act, 1893, corresponds to sub-section (2) of the present Act The English Act does not specifically deal with the case where notice is not given by the unpaid seller to the buyer. The Indian Act, on the other hand, definitely declares that if notice is not given, the unpaid seller is not entitled to recover damages for any loss occasioned by the breach of contract, and the buyer is entitled to the profit, if any, on the re-sale.

What does the right of the unpaid seller in fact amount to? Does it mean a mere right to retain possession until he is paid or something more, that is to say, a right to interfere not only with the buyer's right of possession but also with his right of property in the goods? Lord Blackburn observed on this point[3]:

"Viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for

1 Martindale v. Smith (1841) 1 Q B. 389, 55 R.R. 285; See also notes under section 11, ante.

2 See Pollock and Mulla, Indian Sale of Goods Act, page 278; Stephens v. Wilkinson (1831) 2 B. & Ad. 320; Gillard v. Brittan (1841) 8 M. & W. 575; Page v. Cowasjee Eduljee (1866) L. R. 1 P. C. 127.

3 Blackburn on Sale, 2nd Edn., p. 446.

the price, with a power of re-sale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the re-sale was conducted by the vendor in a fair and reasonable manner, the original purchaser who was in default would have no right to complain; if the re-sale produced a sum greater than the unpaid portion of the price, the purchaser would be entitled to the surplus; if there was a deficiency he would still remain indebted to the vendor for that amount.

As sub-section (4) declares the contract to be rescinded by a re-sale, and sub-section (2) contains no such declaration especially as by section 46 (1) (c), the seller has only a right of re-sale "as limited by the Act"—the natural inference would be that a re-sale falling under sub-section (2) does not rescind the contract. If this be so, the buyer is still the owner of the goods so as to be liable for the price under section 55 (1), and entitled to any profits on the re-sale[1]. The point is treated as doubtful in English law[2].

Perishable goods

Where the goods are of a perishable nature, no notice by the unpaid seller to the buyer of his intention to re-sell is necessary. If the buyer does not within a *reasonable* time pay or tender the price, the unpaid seller may re-sell the goods within a *reasonable* time and recover from the original buyer damages for any loss occasioned by his breach of contract and the buyer is not entitled to any profit which may occur on the re-sale.

There is no definition of "perishable goods." It is presumed that goods will be considered as of perishable nature, not only when they are such as to deteriorate physically by being kept, but also when they are such as to be subject to deterioration in a commercial sense, so as to be likely to become unmerchantable as such[3]. At common law a close resemblance has been judicially discerned between the perishable quality of the goods themselves and of their price[4]. But it apears that the fact that the goods are likely to deteriorate in value by reason of a fall in the market price does not make them of a perishable nature uuder the Act[5].

Re-sale on due notice to buyer

In the case of goods which are not perishable an unpaid seller who has exercised his right of lien or stoppage in transit, may give notice to the buyer of his intention to re-sell, and if the buyer does not with a *reasonable* time or pay tender the price, he may re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract. In this case the buyer is not entitled to any profit which may occur on the re-sale.

It is to be noted that the unpaid seller can exercise this right of resale after he has exercised his right of lien or stoppage in transit; thus if there is no valid lien or stoppage in transit there could be no valid resale.

It is clear that the unpaid seller can resell under this section when the property has passed to the buyer; but it is not clear whether the effect of a valid resale is to rescind the contract so that

1 See Benjamin on Sale, 7th Edn., p. 988.
2 Ibid.
3 Asfar v. Blundell, (1896) 1 Q. B. 123: dates become unmerchantable as dates being impregnated with sewage although they were of considerable value for the purpose of distillation; Dakin v. Oxley (1864), 15 C. B. (N. S.) 646; Duthie v. Hilton (1868) L. R. 4 C. P. 138; cement becoming wet had lost its properties as cement.
4 Maclean v. Dunn (1828), 4 Bing. 722, at 728, 729.
5 See Benjamin on Sale, 7th Edn., p. 989.

the seller is reselling as owner, though the provision that the buyer is not entitled to any profit arising from such resale indicates that the seller is not selling as buyer's agent but in his own right. The test is whether after a valid resale the seller has any claim for price or whether the buyer can get the delivery of the goods by payment or tender of the price. The provision in the section that the seller after resale is entitled to damage for the breach of contract seems to negative any such right.[1] The consequences of a valid resale are clearly indicated in the section and so the question whether a resale under the section amounts to a rescission of the contract is not of much practical importance. But in the case of an invalid resale the contract exists for the benefit of the buyer and he is entitled to any profit arising from such resale, though under section 54 (3) he may have no right to recover the goods against the second buyer. It should be noted that under Section 54 (4) it is expressly provided that a resale under a resale clause rescinds the contract.

Reasonable time

The object of giving notice to the buyer is to enable him to make payment. The buyer should have a reasonable time to pay after he has notice of resale.[2] The seller would not be justified in reselling it if the buyer tenders the price after notice of resale.[3] If the buyer repudiates the contract the seller may rescind the contract by accepting the repudiation and resell the goods as his own but if the seller does not rescind the contract it exists and the buyer is entitled to notice of resale under the section. The condition in this sub-section that the buyer shall pay or tender the price within a reasonable time applies both where the goods are perishable and where the seller gives notice of re-sale. What is a reasonable time is a question of fact, and in the case of perishable goods it should, it seems, be measured from the date of the contract, if no time for delivery be provided, and otherwise from that time. Where the seller gives a notice of re-sale reasonable time will no doubt be calculated from the date of the notice and the reasonableness of any period specified in the notice will depend upon whether there was or was not undue delay previous thereto.[4]

Notice of the time and place of resale should generally be given as the object of giving notice is to enable the buyer to pay before re-sale takes place In an American case (*Pollen* v. *LeRoy*[5]) it has been held that the giving of time and place of resale in the notice was not essential

The re-sale also must be within a reasonable time. In *Parthasarathy* v. *Gajapathi*[6] where goods which had as reasonable value were re-sold eight months after, at a very low price, the court held the delay unreasonable. In *Prag Narain* v. *Mool Chand*[7] a delay of eleven months was similarly held unreasonable.

1 See Maclean v. Dunn (1827) 4 Bing. 722 as to the position at common law.

2 See Compton v. Bagby (1892) 1 Ch. 320, 321.

3 Martindale v. Smith (1841) 1 Q. B. 389 ; Walter v. Smith, 5 B. & Ad. 439 ; Buchanan v. Abdall (1875) 15 B. L. R. 276, 293.

4 See Benjamin on Sale, 7th Edn.' p. 990.

5 30 N. Y. 549.

6 A I.R 1925 Mad. 1258= (1925) 48 Mad. 787.

7 (1896) 19 All. 535 See also Nikku Mal v. Gur Parshad. A. I. R. 1931 Lah. 714 =12 Lah. 452=134 I. C. 777 ; Abdul Hakim v. Jantzen (1934) Lah. 319=72 I. C. 772 : Coorla Spg. & Weaving Mills v. Vallabhdas (1925) 27 Bom. L. R. 1168=94 I. C 575 ; Raggu Mal v. Ram Sarup, A. I. R. 1935 Lah. 593 ; Sheo Narain v. N. S. S. & G. Co. A I. R. 1938 All. 272 ; Jasrat Mal v. Jaini (1937) 39 P. L. R. 945.

Where the contract is for the purchase of goods to be taken delivery of in instalments, on the breach by the purchasers of such contract, the sellers get a right to cancel the sale and to re-sell the goods and recover damages, it is the duty of the sellers to sell the goods relating to each instalment within a reasonable time after the breach to take delivery on the respective dates. But where the delay in the exercise of this right is due entirely to the conduct and action of the purchaser, the sellers are entitled to claim damages with reference to the rates at which they actually sold the goods. The Sale of Goods Act does not prevent parties from making any contract they please. There is nothing to prevent the parties from agreeing between themselves that inspite of the fact that the property in goods has not passed or there has been no appropriation by either of them of the goods towards the contract the seller will have the right to re-sell against the defendant in breach and also to recover godown rent, insurance charges etc. Section 62 of the Act expressly recognises that right[1].

Measure of damage

Prima facie, the measure of damages that could be got from a defaulting purchaser is the difference between the contract price and the *price realised* together with the expenses of re-sale.[2] But a *re-sale commission* cannot be charged.[3] Where the goods contracted for have not been appropriated to the particular contract, damages will be measured by the difference between the contract rate, and *the market rate on the date of breach*[4]

Profit

Under the present Act if a notice has been duly served on the buyer, he is not entitled to any profit which may occur on the re-sale under sub-section (2) of this section[3] Of course, as already noted, he will bear the loss. In a case arising under the Indian Contract Act, the Allahabad High Court had held that the buyer was entitled to any surplus remaining after re-sale[5]. The law on this point is changed now

If, however, the seller is not selling under this section but as an agent of necessity of the buyer he is accountable to the buyer for the sale proceeds and make over to him any excess after deducting the price.[6]

Deposit of lowest money and part payment of price

It has been held under the English law that a deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do so. As regards recovery of part payments the question must depend on the terms of the particular contract If the contract distinguishes between the deposit and instalments of price and the buyer is in default, the deposit is forfeited and that is all. And in ordinary circumstances, unless the contract otherwise provides, the seller, on

Sheo Narain Gopi Ram v. The New Savan Sugar & Gur Refining Co, A I.R 1938 All 272=175 I. C 552

Exparte Stapleton (1879) 10 Ch D 586, Nikku Mal v. Gur Prasad, (1931) 12 Lah. 452=A. I. R. 1931 Lah. 714=134 I. C. 777; Muhammad Abdul Subhan v. Ghulam Hussain, A. I. R. 1935 Nag 66=156 I. C 156; Page v. Cowasjee (1866) L. R. 1 P. C. 127, 145; Noble v Edwards (1877) 5 Ch. D 378.

3 Cillanders Arbuthnot v. Official Assignee, A. I. R. 1931 Sind 26=129 I C 912

4 Angulia v Sassoon (1912) 39 Cal. 568.

5 Seo Peare Lal v. Dev Karan Das, A. I. R. 1930 All. 886=125 I. C 592.

6 See Prager v. Blatspiel (1924) 1 K. B. 566.

rescission following the buyer's default, becomes liable to repay the part of the price paid[1]. The same suggestion has been made in cases in India of payment in advance of part of the price to construe the term profit as surplus realised by re-sale after giving credit for advance payment[2]. This is a matter which still requires judicial decision.

The position appears to be that where the deposit is made as a guarantee for the performance of the contract by the purchaser he cannot recover it if the sale goes off through his default. If there is a forfeiture clause the rights of the parties will be governed by such a clause. But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. The court has to determine the intention of the parties in each case from all the terms of the contract.[3] It was held that it is just and proper that the right to specific performance of a contract, or in the alternative, to a return of earnest money, should be determined in the same suit[4]. In *Balvanta* v. *Vira*[5] it was held that the purchaser could not recover the deposit as the sale went off through his default and that refusal of specific performance does not necessarily mean forfeiture of deposit[6]. It has also been held in *Tikan Chand etc.* v. (*Firm*) *Kakhan Lal etc,*[7] that the use of the word "deposit" in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor.

For re-sale the seller must act in a reasonable manner—invalid resale.

The seller must act as a reasonable man of business in like circumstances, otherwise he cannot claim the benefit of this secton[8]. The seller who omits to sell within a reasonable time will not be entitled to recover his actual loss, but only the difference between the contract rate and the market rate on the date of default. If the resale price exceeds that differnce, the seller must make over the excess to the buyer ; the seller may also be liable for any loss the buyer may be put to if there is any negligence in conducting the resale[9]. The liability of the seller to refund the profit arises from the fact that in case of an invalid resale the contract is not put an

1 See Benjamin on Sale, 7th Edn. page 989 ; See also Halsbury, Laws of England, 2nd Edn. Vol. XXIX. page 187 wherein it is stated that in calculating the loss by the buyer's default the seller must take into account any deposit on the price which may have been paid by the buyer.

2 See Pollock and Mulla, Sale of Goods Act, page 280.

3 See Nawab Habibullah v. Arman Dewan, 29 C. W. N. 40 ; Ibrahimbhai v. Fletcher (1896) 21 Bom. 827, 857 F. B.

4 See Dhanrajgiri v. Tata & Sons (1924) 49 Bom. I. See also Baghunath v. Chandra (1912) 17 C. W. N. 100.

5 (1897) 23 Bom. 56.

6 See also Chiranjit v. Har Sarup 50 M. L. J. 629 P. C. ; Mohammad Habibullah v. Mohammad Shahji, (1919) 41 All. 324 ; Subbayyar v. Munisami, 50 Mad. 161 ; Piare Lal v. Mina Lal, (1928) 50 All. 82 ; Roshan Lal v. Delhi Cloth etc. Co, (1910) 33 All. 166 ; Nadir Chand v. Satish Chandra (1928) 55 Cal. 638 ; Vellore Taluk Board v. Gopalswamy, (1915), 38 Mad. 801.

7 A. I. R. 1937 Lah. 842.

8 See Mackertich v. Nabo Coomar (1903) 30 Cal. 477=7 C.W.N. 433 under the Indian Contract Act.

9 Hari Chand v. Gosho Kabushiki (1925) 49 Bom. 25. Nikku Mal v. Gur Parshad A.I.R. 1931 Lah. 714=12 Lah. 452=134 I.C. 777; Shamlji Dayal v. Durga 56 I.C. 647 : Maung Gyi v. Moosagi, 86 I.C. 252 ; Raggu Mal v. Ram Sarup, A.I.R. 1935 Lah. 593=16 Lah. 858=37 P.L.R. 525.

end to and the seller is selling buyer's goods as his agent and as such is accountable to him. If however on default of or repudiation by the buyer the seller rightfully rescinds the contract, a subsequent resale of the goods at a profit does not assure for the benefit of the buyer ; for after the contract has been put an end to the reseller is reselling his own goods with which the buyer has no concern[1].

Does the rule as to sale within a reasonable time apply where the seller is, as it were, given *carte blanche* to re-sell when he chooses ?[2] In *Sital Prasad* v *Ranjit*[3], a case under old section 107 of the Contract Act it has been pointed out by the Allahabad High Court that this is a mandatory provision of law and that a re-sale contravening it will be invalid unless there is a trade usage sanctioning it.

In *Macklin* v. *Newbury Laundry*[4] the re-sale was conducted in such a way as not to fetch the proper price ; hence damage on resale basis was not granted.

Whether resale should be private or by public auction would depend on what is the customary manner of selling the commodity in question and what is likely to fetch the best price[5].

In *Narsinggirji Manufacturing Co.* v *Budan Saheb*[6] though the damage was claimed on the basis of resale, there being no valid resale the court granted damages on the basis of the difference of contract rate and market rate without amendment of plaint. In *Buchanan* v. *Avdall*[7] relief was claimed on the basis of resale which was invalid on account of concealment. It was held that the conduct of the seller deprived him of the right to claim damage on the basis of difference between contract rate and market rate.

Goods resold must be contracted for—sub-section (2) will apply only where property has passed to the buyer.

As the rights of lien and stoppage in transit can only arise after the property in the goods has passed to the buyer, it follows that the right of re-sale under the present sub-section can only be exercised where the property has so passed.[8] The same fact has been emphasised in *Har Parshad* v. *Girdar Prasad*[9]. The case where the contract itself provides a re-sale clause, falls under sub-section (4).

1 See Jamal v. Moola Dawood (1916) 43 Cal. 493 P.C.

2 See Ramier v. Durwas J. Subbier, A.I.R. 1927 Mad. 352 ; Pearl Mill Co. v. Ivy Tannery Co. (1919) 1 K.B. 78.

3 A.I.R. 1931 All. 583=136 I.C. 158.

4 (1919) Sol. Jour 337.

5 See Pollen v. L. Roy, 30 N.Y. 549.

6 A.I.R. 1924 Bom. 390. But see Angullia v. Sassoon (1912) 39 Cal. 568.

7 (1875) 15 B.L.R. 276.

8 See Duraswami Mudaliar v. Subhana, A.I.R. 1927 Mad. 380=105 I.C. 613; Asa Ram v. Kishan Chand A.I.R. 1930 Lah. 366=120 I.C. 166; Nanak Chand v. Panna Lal, A.I.R. 1930 Lah. 389; Sundar Singh v. Gulab A.I.R. 1927 Lah. 269; Ishar Das v. Dhanpat Rai, A.I.R. 1927 Lah. 687 ; Narsingirji v. Budan Sahib A.I.R. 1924 Bom. 390; Hari Das v. Katumull (1903) 30 Cal. 649; Olive Jute Mills v. Ebrahim, (1896) 24 Cal. 177 ; Yule & Co. v Mohammad Hussain (1896) 24 Cal. 124 ; Mohan Lal v. Gyani Ram, A.I.R. 1935 Nag. 111=155 I.C. 778; Ujagar Mal. v. Nanhe Mal=157 I.C. 963; Coorla, etc. Mills v. Vallabh Das (1925) 27 Bom. L.R. 1668.

A.I.R. 1931 Lah. 191; See also Zippel v. Kopur & Co., A.I.R. 1932 Sind 9=139 I.C. 114; Hunt v. Sin Gee (1921) 66 I.C. 510.

The goods re-sold must be the goods contracted for. In cases arising under old section 107 of the Contract Act, it has been held that before a plaintiff can substantiate a claim for loss on re-sale, he must show that the goods re-sold by him were goods which the defendant would have been obliged to take under the contract[1].

When no due notice is given to the buyer.

Where no notice is given to the buyer, the unpaid seller is not entitled to recover any damages from him for any loss occasioned by him breach of contract, and the buyer is entitled to the profit, if any, on the re-sale. In this case the goods are evidently sold as the buyer's goods and the seller is in the position of a trustee who must account to the buyer for any profit resulting from the re-sale. Probably the reason for denying the right to recover damages to the seller is that he deprives the buyer of the opportunity to pay or tender the price which he should have before the goods are re-sold. In cases of urgency, it appears, the seller in possession of the goods may be justified in selling them on behalf of the buyer, acting as an "agent of necessity.[2]"

Sub-section (3)—position of the second buyer.

Sub-section (3) prescribes that where an unpaid seller who has exercised has right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer; notwithstanding that no notice of the re-sale has been given to the original buyer. It is thus made clear that a buyer at a re-sale, even though wrongful, acquires a good title. The object of this rule is to protect the second buyer who may not be aware of any defect in the conduct of the resale, the first buyer having his remedy against the sale proceeds in the hands of the seller. Even at common law he practically did so, the reason given being that the first buyer being in default had not that immediate right to possession of the goods which was essential to enable him to maintain trover[3].

The sub-section does not in terms require good faith and absence of notice on the part of the second buyer[4].

Sub-section (2) has no application when the first buyer is not in default, for instance, if before the re-sale he has duly tendered the purchase price. In such circumstances, the second buyer must rely upon the provisions of section 30 and will only obtain a good title as against the first buyer if he acted in good faith and without notice of the seller's defective title.

Where the re-sale has been held without justifying circumstances (*e.g.*,) before the due date for payment, the buyer may treat it as a ground for repudiation[5].

1 Chidambara Nadar v. Vadivelu Nadar, A.I.R. 1936 Mad. 47=159 I.C. 1031; Parthasarathy v. Gajapathi, A.I.R. 1925 Mad. 1258; Buchanan v. Avdall (1875) 15 Bom. L.R. 276; Phul Chand v. Jugal.

2 Prager v. Blastpeil (1924) 1 K.B. 566.

3 See Lord v. Price, (1874) 9 Ex. 54; Milgate v. Kebble, (1841) 134 E.R. 1073; 60 R.R. 475.

4 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, page 185, f.n.(u).

5 Kishori Lal v. Jiwan Lal, A.I.R. 1928 All. 242=67 I.C. 281.

The first buyer cannot sue the second buyer for trespass, or for the conversion or for the detention of the goods, for the second buyer has a statutory title under this sub-section.

It may be noted that the law is different when one in possession of goods with a mere lien on them unlawfully selles them. A buyer from him acquires no title against the owner and is liable to be sued in trover for the full value of the goods[1].

Sub-section (4)—right of re-sale expressly reserved by seller in the contract.

Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages. The rule in this sub-section is based on the decision in *Lamond* v. *Davall*[2]. There was no corresponding provision in the Contract Act and there was some doubt as to whether the resale under a resale clause rescinded the contract[3]. But the section makes the law clear.

Sub-section (4) read with sub-section (2) clearly indicates that the power to re-sell may be either statutory or it may be conferred on the seller by the terms of the contract of sale. As has already been observed, for the exercise of the statutory right under sub-section (2), it is essential that the property in the goods must have passed to the buyer; the right under the terms of the contract can be exercised even if the property in the goods has not passed to the buyer. Thus, where it is provided in a contract of "indent" that on default on the part of the buyer to pay for and take delivery of the goods within a specified time, the seller would be at liberty to re-sell the goods, and that the buyer would pay all the loss arising on the contract with interest, the seller is entitled to re-sell the goods on default on the part of the buyer even if the property in the goods has not passed to the buyer, and to sue the buyer for the loss on re-sale[4].

In *Jumal* v. *Moolla Dawood*[5] the resale clause ran thus: "in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction and by loss arising should be recoverable from the buyer." On the shares being tendered by the sellers the buyers refused to accept and pay for them. The sellers gave notice of resale but subsequently claimed damage on the basis of the difference of the contract rate and the market rate on the date of default. The sellers subsequently sold the shares at a profit. As to the effect of the re-sale clause the

1 See Mullner v. Florence (1878) 3 Q.B.D. 484 C.A. This marks the distinction between the seller's lien and an ordinary lien.

2 (1847) 9 Q.B. 1030; 72 R.R. 502,

3 See Jainarain v. Narain Das (1922) 3 Lah. 296.

4 Moll Schutte & Co. v. Luchmi Chand (1898) 25 Cal. 505, dissenting on this point frome Yule & Co. v. Mohammad Hussain (1896) 24 Cal. 124; Basdeo v. John Smidt (1899) 22 All. 55, 65; Best v. Haji Mohammad Sahib (1898) 23 Mad. 18; Bubby Hurry & Co. v. M. Hertz & Co. Ltd. A.I.R 1928 Lah. 541 =4 Lah. 215, 222 = 78 I.C. 421; McLean v. Dunn (1828) 4 Bing. 722: the seller by reselling does not lose his right to claim damage for breach of contract

5 (1916) 20 C.W.N. 105=43 Cal. 493 P.C.

Privy Council stated: "upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages and the stipulation in question was in His Lordship's opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for inorder to ascertain what was the loss arising by reason of the purchaser not completing at the contract price." It was also held that the purchaser was not entitled to the benefit of resales at a higher price as the loss to be ascertained was the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the purchaser is entitled to the benefits of it, but he is not entitled to the benefits of subsequent sales by the purchasers.

But ordinarily, even where the power of sale is provided by the contract, the goods must be ascertained or appropriated for the purpose of the contract[1]. If there has been no such appropriation, there is, strictly speaking, nothing on which to exercise the power of re-sale.[2]

The parties may, however, provide for the exercise of the power of re-sale, even if no goods are appropriated to the contract[3]. And though the contract may provide for a power of re-sale, the seller is not bound to exercise it[4]. The seller has a right to re-sell, but no statutory duty is cast upon him to do so[5]. In *Robinson* v. *Behar*[6] the conditions of sale in a sale by auction provided that "goods purchased and not paid for or removed within a reasonable time shall be resold and the deficiency (if any) made good by the defaulter." Held, that "shall" was permissive and not mandatory, and the auctioneer was entitled to maintain an action for the price of the lot not paid for or removed.

It may be observed that the re-sale may be by auction, and if the seller buys in the goods at the auction, the re-sale is still valid[7]. A buyer in default cannot set up that the contract has been rescinded by the re-sale as a defence against the seller's action for damages for his loss[8].

If a contract of sale is received by the seller excercising his right of re-sale, the arbitration clause in the contract is also wiped out, and hence no reference to arbitration can be made in pursuance thereof.[9]

1 Dayal Singh v. Beli Ram, A.I.R. 1929 Lah. 38=115 I.C. 77.
2 Angulia v. Sasson, (1912) 39 Cal. 568 =13 I.C. 705.
3 Rattan Lal v. Tek Chand, A.I.R. 1930 Lah. 879=120 I.C. 785; Ishar Das v. Dhanpat Rai, A.I.R. 1927 Lah 687= 8 Lah. 514=106 I.C. 59.
4 Jamal v. Moola Dawood, (1915) P. C. 48= 43 Cal. 493=31 I. C. 949.
5 Mohammad Abdul Subhan v. Ghulam Hussain A. I. R. 1935 Nag. 66=156 I. C. 156.
6 (1927) I. K. B. 513.
7 Rattan Lal v. Tek Chand, supra; Nathu Mal Ram Das v. B. D. Ram Sarup & Co., A. I. R. 1932 Lah. 169=12 Lah. 692=135 I. C. 778.
8 See Benjamin on Sale, 7th Edn. p. 994.
9 Radha Kishan v. Bombay Co. Ltd., 1943 Lah. 295=45 P. L. R. 287.

Arbitration clause in contract

The contract for sale of goods gave a right of re-sale to the seller in case of default on the part of the buyer and provided that any dispute arising out of the contract whatever its nature shall, unless amicably settled, be referred to arbitration. The contract rescinded by exercise of right of re-sale by seller. *Held*, that the arbitration clause being an integral part of the contract was also wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be made in pursuance of the arbitration clause. *Held further*, that the fact that S. 54 (4) kept alive the seller's right to damages arising out of buyer's default did not entitle the seller to enforce that claim by reference to arbitration under the arbitration clause which was no longer subsisting. The only way of enforcing the claim for damages was by way of a suit in court of law.[1]

Buyer must be in default

It must be noted that the buyer must be in default in order that the seller may claim damages against him on a re-sale, whether under the Act or the contract. A buyer might lawfully reject the goods as not answering the description; in such a case if the seller re-sells them at less than the contract price, he can recover nothing[2]. The *onus* seems to be in such a case on the seller who re-sells to show that the goods in fact answered the description[3].

What default of buyer will justify a re-sale? In *Ogg* v. *Shuter*[4] Keating J. laid down the law that the seller's right of re-sale depends upon whether there has been an absolute refusal by the buyer to perform his part: in other words, whether there has been a repudiation, so as to entitle the seller to rescind the contract and resell the goods. The view that the right of resale rests wholly upon the buyer's repudiation has been endorsed by the Court of Appeal in *Cornwall* v. *Henson*[5].

Right of re-sale must be exercised within a reasonable time.

In this case also re-sale must be exercised within a reasonable time and in a reasonable manner. If it is not so exercised, the seller is not entitled to recover the loss resulting from the re-sale, but is entitled to damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach[6]. A sale was not held valid where it was hurried on in an unusual manner and without proper advertisement[7]. Where a right of re-sale is allowed to a seller, it must be exercised within a reasonable time of the date when the contract was finally repudiated by the buyer. Where there has been undue delay, the belated re-sale cannot afford a proper basis for the assessment of damages. In such a case the damages should be calculated on the difference between the contract rate and the rate prevailing in the market on the date of the breach[8].

1 Chandu Lal Parma Nand v. G. Ahams Trading Co. (India) Ltd, A. I. R. 1941 Lah. 427=43 P. L. R. 693.

2 Parthasarathy Chetty & Co. v. Gajapathi Naidu & Co. supra.

3 Ibid; Phul Chand v. Juggal Kishore, A. I. R. 1927 Lah. 693=8 Lah. 501=105 I. C. 10; cf. Jackson v. Rotax Motor & Cycle Co. (1910) 2 K. B. 937, at p. 948, C. A.

4 (1875), L. R. 10 C. P. 159, at 165.

5 (1900) 2 Ch. 298 (C. A.)

6 See in this connection Hari Chand v. Gosho Kabushiki Kaisha (1925) 49 Bom. 25=A. I. R. 1925 Bom. 28.

7 Buchanan v. Avdall (1875) 15 B. L. R. 276.

8 Jasrat Mal v. M. L. Jaini & Co, 39 P. L. R. 945.

Right of re-sale does not bar other remedies.

As already observed, no statutory duty is cast upon the seller to re-sell the goods[1]. Where property in goods sold had passed to the purchaser, and after paying for and taking delivery of a part, he wrongfully declined to take delivery of the rest, and the undelivered portion was subsequently destroyed by fire, it was held, in a suit by the vendor for the balance of the purchase money, that though he might have sold the undelivered portion under this section after the defendant had refused to perform his contract, he was not bound to do so, and the omission to take that course did not affect his right to recover the balance sued for[2].

The present section does not any more than did section 107 of the Indian Contract Act, which it replaces, deprive an unpaid seller of goods of ony other remedy he may have; and therefore he is still at liberty to rescind the contract under section 55 of the Indian Contract Act, if it applies[3].

"We are bound, I think, to determine questions of this kind so far as we can by reference to the Contract Act, and not to English law, and sections 51—58 appear to contain general provisions which are applicable to all cases of reciprocal promises.[4]" "No doubt section 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small saticfastion for the vendor to re-sell.[5]"

Tortious re-sale of goods by the seller.

It has been held under the English law that where goods have not been delivered a re-sale by the seller without the buyer's default is wrongful, and the buyer may elect either to sue him for non-delivery, or to treat the re-sale as a repudiation of the contract by the seller and rescind it himself accordingly, and recover any part of the price paid, as well as damages for non-delivery. And if the buyer is at the time entitled to the possession of the goods, such a re-sale is a conversion. The seller is also liable in detinue if the buyer within the contract time tender the price and demand the goods[6]. A seizure and resale of the goods by the seller after delivery is tortious, and the buyer, even if he has committed a breach of contract, may sue the seller of conversion or in trespass or detinue and may recover as damages the full value of the goods. In such action the seller cannot set off the unpaid price, but may sue or counterclaim for it. Such a resale cannot be treated by the buyer as a rescission of the contract. Accordingly he cannot recover back any part of the price paid, or refuse to pay the remainder of it or the whole price, as the case may be, when due. Where, however, the property in the goods has not passed to the buyer a seizure of them by the seller after delivery operates as a rescission of the contract, even although the

1 See page 444.

2 Baldeo Dass v. Howe (1880) 6 Cal 64; See also Mohammad Abdul Subhan v. Ghulam Hussain, A. I. R. 1935 Nag. 66=156 I. C. 156 and Robinson, Fisher & Harding v. Behar (1927) 1 K. B. 513.

3 Buldeo Doss v. Howe, supra.

4 Ibid, per Garth, C.J. at p. 68.

5 Ibid, per Pontifex J. at p. 69; See also Buchanan v. Audall (1875) 15 B.L.R. 276, 292.

6 See Benjamin on Sale, 7th Edn., p. 998.

seizure were pursuant to an express power in that behalf exercisable on the buyer's default[1].

Forms of action are immaterial now and it may be stated as a matter of substantive law that in the case of a wrongful or tortious re-sale of goods by the seller, the buyer shall be entitled to recover his actual loss and no more. If the re-sale results in a profit, the difference between the contract price and the price realized on re-sale will *prima facie* represent the buyer's loss and he is fully compensated if he recovers the difference from the seller. If on re-sale the amount realized is less than the contract price, the seller must suffer the loss[2].

After lawful sale of undelivered goods, the buyer is no longer liable for the price[3].

Alternative claim for damages.

Where in a case for damages for breach of contract a party claims damages on the basis of a re-sale and fails to prove it, it cannot in appeal set up an alternative claim for damages on the basis of a market price[4].

1 See Benjamin on Sale, 7th End., p. 995.

2 The position appears to have been different under old section 107 of the Indian Contract Act. See Sital Prasad v. Ranjit Singh, A.I.R. 1931 All. 583= 136 I.C. 158; See also Pollock and Mulla, Indian Sale of Goods Act, page 280.

3 Hore v. Milner (1797), 1 Peake, 979; per cur in Maclean v. Dunn, supra.

CHAPTER VI.

SUITS FOR BREACH OF THE CONTRACT.

Suit for price.

*55. (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

This section is based on sub-sections (1) and (2) of section 49 of the English Sale of Goods Act, 1893 (Appendix A) The provision in sub-section (3) of that Act dealing with interest has been included in section 61 of the Act. Chapter VII of the Indian Contract Act, 1872, was silent on this point and under that Act resort was to be had to the general provisions of the Act relating to the breach of contract.

Suit for price—where property has passed—sub-section (1).

When the property in the goods has passed to the buyer the seller can always sue for the price whether the goods are in the possession of the seller or buyer. If the goods are in the possession of the seller he can exercise his right of lien but as the contract is not rescinded by the exercise of this right, the seller can sue for the price until the goods are resold by him in which case the seller can only claim damages[1]. If both the property and possession are with the buyer, the seller has no other remedy against the goods or for damage; he can only sue for price.[2] The principle at common law is, that the goods have become the property of the buyer, and that the seller has agreed to take for them the buyer's *promise* to pay the price. The seller's remedy is limited to an action for the breach of that promise, the damages being the amount of the price promised, to which may be added interest in certain cases.[3]

It may be stated generally that the seller may recover the price of goods sold, either where the goods have been *sold and*

*Analogous law.
Sub sections (1) and (2) of section 49 of the English Sale of Goods Act, 1896—See Appendix A.

1 See Lamond v. Dawall (1847) 9 Q.B. 1030; P. R. & Co. v. Bhagwandas (1909) 34 Bom. 192.

2 See Martindale v. Smith (1841) 1 Q.B. 389.

3 See Benjamin on Sale, 7th Ed., p. 864.

delivered to the buyer, or where they have been only ***bargained and sold*** to him. The latter form of action is applicable ***where the property has passed***, and the contract has been completed in all respects except delivery. If the passing of the property depends upon the fulfilment of some condition and that condition is not fulfilled the seller cannot sue for the price, even if the non-fulfilment of the condition is due to the default of the buyer. In such a case the seller must bring an action for damages under the next section[1]. If, on the other hand, the property has passed and the payment of the price depends upon the fulfilment of some condition, and that condition is not fulfilled owing to the default of the buyer, then the seller may sue for the price, and this holds good even if by the terms of the contract the non-fulfilment of the condition reverts the property in the seller[2].

Passing of property in goods-sale and agreement of sale

In considering whether the terms of a transaction constitute an out and out sale or a mere agreement to sell, the court must endeavour to ascertain when it was the intention of the parties that the property in the goods, the subject of sale, was to be transferred. Where it is plain from the terms that from the time when they were entered into the seller could not have dealt with the property, and had he attempted to do so the buyer could clearly have restrained him by injunction immediately and when further the buyer was to be at liberty to deal with the property and to take steps to realise it, the intention of the parties must be held to be that the property in the goods should pass from the seller to the buyer forthwith. The fact that the buyer is given sometime for paying the money fixed as the sale price can in such cases be taken only as an option given to the buyer and to amount to the seller agreeing to give credit to the buyer for that period of time. If in such a case the buyer wrongfully refuses to pay the price, the seller is entitled to maintain an action for the price under S. 55 (1) of the Act. Even if it be held in such a case that the property in the goods has not passed, the seller would be, nevertheless, entitled to maintain his claim under S. 55 (2).[3]

Buyer must wrongfully neglect or refuse to pay

The seller cannot sue for the price unless the buyer wrongfully neglects or refuses to pay[4]. *Prima facie*, payment of the price must be made against delivery[5], but the parties may agree that the payment shall be postponed, as when the sale is on credit, or payment is made to depend on a contingency[6]. In the case of a sale on credit, no suit is competent until the expiry of the credit period[7]. Where a bill is given for the price, the seller cannot sue during the currency of the bill. In case of dishonour of the bill on presentment the seller has the option of suing for the price or on the bill, in case he has not negotiated it. But if he has negotiated the bill away, he cannot sue for the price as long as the bill is in the hands of the third party.

1 Colley v. Overseas Exporters (1921) 3 K. B. 302; Mitchell Reid & Co. v. Buldeo Doss (1887) 15 Cal. 1 (buyer refusing to take delivery); Stein Forbes & Co. v. Country Tailoring Co. (1916) 115 L. T. 215.
2 [illegible] v. Dick (1881) 6 A C. 251.
3 Vithaldas Vishram v. Jagjivan Gordhandas, A. I. R. 1939 Bom. 84=180 I. C. 858 (2).
4 Vithaldas v. Jagjivan, A I.R. 1939 Bom. 84 (1939) 41 Bom. L R. 33.
5 See Section 32, ante.
6 See Calcutta Co. v. De Mattos (1863) 32 L. J. Q. B. 322 at p. 328; 139 R. R. 752, 762.
7 Helps v. Winterbottom, (1831) 109 E. R. 1208, 36 R. R. 609.

The seller must have taken up the bill himself before action brought in order to entitle him to sue for the price[1].

Credit allowed is revocable when it is not a term of the contract[2].

Payment by negotiable instrument

Where there is an agreement for payment of the price by a bill payable at a future day, and the bill is not given, the seller cannot sue for the price till the bill would have matured. His remedy before that time is by action for damages for breach of the agreement[3]. The same rule applies, at any rate, if the contract be entire, if the price is payable partly in cash and partly by bill[4]. Where, however, part of the goods are delivered and the buyer repudiates the contract, the seller may sue for the price of those actually delivered at once.[5] If, on the other hand, the buyer owing to the seller's default refuses to give a bill, the seller cannot sue for the price of the goods actually delivered until the expiration of the time at which the bill would have matured[6].

Where the price is payable in a foreign currency, the exchange must be calculated at the rate in force at the time when the debt became due[7].

If the giving of the bill or note be the condition to credit being allowed at all, as, for example, where the goods are sold for "cash with option of bill" and the bill is not given, the seller may sue at once for the price[8]. When the seller agrees to take the buyer's acceptance for the price, it is his duty to tender a bill to the buyer to get his acceptance[9].

Where the buyer's banker gives a confirmed credit to the seller, and agrees to pay for the goods on presentation of the invoice, the banker is liable to the seller if he refuses to pay on the invoice being duly presented, even though he does so under the buyer's instructions.[10]

Sub- section (2)—where property not passed.

Sub-section (2) relates to a case where property in the goods has not passed to the buyer, In cases falling under this sub-section the delivery is not a condition precedent to payment of the price. Where the price is payable unconditionally on a fixed day, the buyer is bound to pay it on that day, whether the property has

Davis v. Reilly (1898) 1 Q.B.I.; cf. Belshaw v. Bush (1851) 11 C.B, 191, 87 R.R. 639 (bill given by a third person and accepted by seller as conditional payment and endorsed away by him, not taken up at the time of action brought for the price.

DeSymons v. Minchwick (1795) 1 Esp. 430.

Paul v. Dod, (1846) 135 E.R. 1158. The measure of damages is the amount of the bill less discount at the time of action brought; Gordon v. Whitehouse (1856) 4 W.R. 231.

Paul v. Dod, supra; Hoskins v. Duperoy (1808) 9 East 498: refusal to give a bill or note does not make the price immediately payable, though the seller may sue for damages caused by the refusal.

5 Bartholomew v. Markwick (1864) 15 C. B.N.S. 711, 137 R.R. 729

6 Waynes Merthyr Steam Coal Co. v Morewood (1877) 46 L.J.Q.B. 746.

7 Peyrae v. Wilkinson (1924) 2 K.B. 166.

8 Rugg v. Weir (1864) 16 C.B. (N.S.) 471, 139 R.R. 582.

9 Reed v. Mestaer (1803). 2 Comyn on Contract, 229; Chalmers, Sale of Goods Act, 11th Edn., p. 129.

10 Urquhart, Lindsay & Co. v. Eastern Bank, (1922) 1 K.B. 318 at p. 323; See Chalmers, Sale of Goods Act, 11th Edn., p. 129.

passed or not, and irrespective of delivery[1]. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent[2]."

The sub-section requires that the price, or part of it, shall be payable, not only "irrespective of delivery, but on a day certain, which means at a time specified in the contract not depending on a future or contingent event.[3]" It applies to instalments of the price as well as to a lump sum. Accordingly it applies to an instalment contract where the price of each instalmnet is separately payable on a named day[4]. But these instalments must also be payable on certain days irrespective of delivery. Where certain shipments of sheepskins were agreed to be paid "for net cash against documents on arrival of the steamer," and the first two instalments were accepted and paid for, and the defendants refused to take up the documents in the case of the third instalment, in an action for the price by the sellers, it was held that the price was not recoverable although the defendants had broken their contract. This decision was based on the ground that the property in the goods had not passed to the defendants and the price was not payable "on a day certain irrespective of delivery," it being payable expressly against delivery on the arrival of the vessel[5].

If goods are delivered under an agreement of sale, the price to be paid on certain days by instalments, the property in the goods to remain in the seller until the instalments are paid, with the right reserved to the seller, to retake possession of the goods on the buyer's failure to pay an instalment, and the seller avails himself of that right, he cannot then sue for the unpaid instalments[6]; and perhaps, in the absence of an express stipulation in the contract entitling him to retain all instalments actually paid, he may have to return these[7]. His remedy is to sue for damages for breach of contract. He may, however, leave the goods in the possession of the buyer and sue for the

1 Dunlop v. Grote (1845) 175 E. R. 64; 86 R. R. 834.

2 Notes to Pordage v, Cole, 1 Wms. Saunders (ed. 1871), p. 551.

3 Shell-Mex, Ltd. v. Elton Cop Dyeing Co Ltd. (1928) 34 Com. Cas 39, at p. 43, per Wright J. citing The Merchant Shipping Co. v. Armitage (1873) L. R. 9 Q. B. 99 (a case relating to a lump sum freight under a charter party).

4 Workman, Clark & Co. v. Lloyd Brazileno (1908) 1 K.B. 968; Shell-Mex v. Elton Co., supra.

It is not clear whether it will apply for instance to a case where the price is payable by instalments as and when the ship reaches certain stages of construction. The case may fall under section 38 (2).

5 Stein, Forbes & Co. v. County Tailoring Co. (1916) 115 L.T. 215, 86 L J.K.B. 448; See also Colley v. Overseas Exporters (1921) 3 K B. 302.

6 Attorney-General v. Pritchard (1928) 97 L J K.B. 561, 44 T L R. 490; Hewison v. Ricketts (1894) 71 L.T. 191. Aliter, if the contract is not a contract of sale but of hiring. In that case he may sue for the unpaid instalments and keep those already paid. Brooks v. Beirnstein (1909) 1 K.B. 98; Abdul Quadeer v. Watson & Sons, A.I.R. 1930 Rang. 193=8 Rang. 236=125 I.C. 361 dissenting from Maung Ba Oh v. Motor House Co., A I.R. 1929 Rang. 368=7 Rang. 431=120 I. C. 132.

7 Hewison v. Ricketts, supra. cf. The Auto Supply Co. v. Raghunatha Chetty A. I. R. 1929 Mad. 884—52 Mad. 829=121 I. C. 593 but see Workman Clark & Co. Ltd. v. Lloyd Brazileno, supra.

instalments as they fall due: and apparently if the contract authorises it, he may retake possession of the goods and exercise his lien upon them, in those cases in which the property has passed to the buyer, to secure the payment of unpaid instalments[1]. In the latter case he is affirming the contract, in the former he is in effect putting an end to it[2].

A provision in a contract of sale for postponement of delivery until payment of the entire price will not *per se* stay the passing of the property in the goods sold. Where a vendor sold his ascertained specific deliverable goods to the vendee on condition that the vendor would keep the goods locked up until the vendee paid the price and if the price was not paid by a certain date the vendor was to be at liberty to re-sell the goods after giving a week's notice to the vendee and the vendee failed to pay as contracted and the vendor brought a suit to recover the balance of price; *held*, that intention of the parties was that property should pass as a matter of fact, because the vendor did not reserve the right of disposal of the goods until the price was paid and hence the suit was valid. *Held further*, that the vendor had a right to sue for price of goods sold under section 55 (2), as the statement in the contract of sale that the seller would have the right to re-sell after notice did not deprive him of his legal right to sue for the price if he desired[3].

Where the buyer deals with the goods in a manner inconsistent with the seller's right, the latter may sue in trover[4].

It may be noted that a claim for the price of the goods is quite different from a claim of non-acceptance[5].

Illustrations

(1) In *Colley* v. *Overseas Exporters*[6], unascertained goods were sold f.o.b. Liverpool. The seller sent them to Liverpool, but owing to the failure of the buyer to name an effective ship, the seller was prevented from putting the goods on board. *Held*, that the default of the buyer did not have the effect of placing the seller in the position in which he would have been if the goods had been put on board; that in the absence of an agreement that the price should be payable on a day certain irrespective of delivery, he could not sue for the price but can only maintain an action for damages.

2. In *Alexander* v. *Gardner*[7] there was sale of butter to be shipped from London and to be paid for by bill at two months from the date of landing. Goods in conformity with the contract were despatched, but the ship was lost. The buyer was held liable to pay the price, for the property in the goods passed to him on shipment, and the term relating to payment merely indicated the time at which payment was to be made, and the arrival of the goods was not a condition precedent to the liability to pay.

1 Bhimji Dalal v. Bombay Trust Corporation, A.I.R. 1930 Bom. 306=54 Bom. 381=124 I.C. 800, (If an agreement in the form made in that case were made to-day, the property in the goods would not be held to have passed, so no question of a lien would arise).

2 See Pollock & Mulla, Indian Sale of Goods Act, page 289.

3 Firm Shankar Lal—Kundan Lal v. Firm Jamna Das—Piyare Lal, A.I.R. 1938 Lah. 80.

4 Peruvian Guano Co. v. Dreyfus, (1892) A. C. 166.

5 Anderson Wright v. Kalagarla Surji Narain, (1885) 12 Cal. 339.

6 (1921) 3 K. B. 302; 90 L. J. K. B. 1301.

7 (1835) 1 Bing. N. C. 671, 41 R. R. 651.

(3) In *Helps* v. *Winterbottom*[1] there was sale and delivery of goods on six months' credit. It was held that no action could be maintained for the price until the expiration of the six months and the Statute of Limitation began to run from that date.

(4) In *Dunlop* v. *Groat*[2] a quantity of iron was sold. It was to be delivered between the 3rd March and 30th April, if the buyer so required; the price to be paid in any event on the latter date. By the 30th April a portion only had been delivered, as the buyer had not required delivery of more. *Held*, the seller may recover the whole price, and he need not show that he has appropriated to the contract any specific iron to complete the delivery of the remainder.

Suit for recovery of price—form

The general rule is that the debtor must find out the creditor. When the price becomes payable it becomes a debt and unless there is a contract that the price is payable elsewhere than where the contract was made or where the goods were at the time of sale such latter place is generally the forum of the suit[3]. Where a seller sues for the price discount may be allowable by the contract or by trade usage and the buyer can claim a set off for such discount if he is entitled to it.[4]

Exchange rate.

In a suit to recover the value of the goods agreed to be paid for "as per home invoice" the rate of exchange for the conversion of sterling into repees should be that prevailing on the date on which payment was to be made under the contract and not that prevailing on the date of judgment[5].

56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. Damages for non-acceptance

This section is based on sectian 50 of the English Act (Appendix A). Is this section as well as in other sections (57 and 59) the provisions of the English Act relating to the measure of damages have been omitted, as they are provided for in sections 73 and 74 of the Indian Contract Act, which run as follows:—

"**73.** When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused by him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Compensation for loss or damage caused by breach of contract

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

1 (1831) 2 B. & Ad. 431, 36 R. R. 609.
2 (1845) 2 C. & K. 153, 80 R. R. 834.
3 Cf. Joachinason v. Swiss Bank (1921), 26 Com. cas. 196 (210); Rein v. Stein, (1892) 1 Q. B. 753 C. A.
4 Exparte Worthington, 3 Ch. D. 803.
5 Shakoor & Co. v. Finlay Fleming & Co., 79 I. C. 291 (Bur.).

Compensation for failure to discharge obligation resembling those created by contract

When an obligation resembling those created by contract has been incurred and has not been discharged any person injured by the failure to discharge it is entitled to secure the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

In estimating the loss or damage arising from a breach of contract the means which existed of remedying inconvenience caused by the non-performance of the contract must be taken into account.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception

When any person enters into any bail-bond recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any Provincial Government gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation

A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.'

Damages for non-acceptance.

This section serves as a residuary provision for the remedies of the seller for the default of the buyer and convers all those case which are not covered by section 55[1]. It lays down that when the buyer wrongfully neglects or refuses to accept or pay for the goods, the seller may sue him for damages for non-acceptance. When the seller has not transferred to the buyer the property in the goods—as where the agreement is for the sale of goods not specific or of specific goods which are not in a deliverable state, or which are to be weighed and measured before delivery—the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer under the contract of sale as a general rule[2] is for damages for non-acceptance. He can in general only recover the damage that he has sustained, not the full price of the goods[3]. Where the property has passed the seller may sue, either for the price[4] under section 55 (1) or for damages for non-acceptance or can exercise his right of lien for the unpaid price and resale of the goods and recover loss as damages under section 54. Section 44 of the Act provides that, where the buyer makes default in taking delivery of the goods, he is liable to the seller for any loss

Boswell v. Kilborn (1862) 15 Moo. P. C. 309; 137 R. R. 86.
As to when the seller may sue for the price, though the property has not passed, see section 55 (2).
Per Parke, B., in Laird v. Pim (1841) 7 M. & W. 474, 478; Atkinson v. Bell (1828) 8 B. & C. 277; Boswell v. Kilborn (1862) 15 Moo. P. C. 309; 137 R. R. 86.
Unless he has re-sold, in which case he must sue for damages, Lamond v. Davall, supra.

occasioned by his neglect or refusal, and also for reasonable charges for the care and custody of the goods.

But before the seller can sue, there must be a wrongful neglect or refusal by the buyer. So, if the seller fails to perform a condition precedent, there is no right of suit, unless the buyer has waived it[1].

Measure of damages.

As already stated, the provisions of section 50 of the English Act which relate to the measure of damages for non-acceptance are omitted from the present Act, as sections 73 and 74 of the Indian Contract Act contain general provisions with regard to the measure of damages embodying the principles underlying sub-sections (2) and (3) of section 50[2]. Section 50 (2) of the English Act adopts the first part of the rule laid down for breaches of contract generally in *Hadley* v. *Baxendale*[3] section 50 (3) being only the most common application of it[4]. Section 73 of the Indian Contract Act is based on the same rule.

"Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands. may go into the market and buy[5]. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them[6]; in fact it is his duty to do so to mitigate the loss." Sections 50 and 51 of the English Act (corresponding to sections 56 and 57 of the Indian Act) summarize the provisions as follows :—

"50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damage is the estimated loss directly and naturally resulting, in the ordinary course of events from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

1 Graves v. Legg, (1854) 156 E. R. 304; 96 R. R. 931, Braithwaite v. Foreign Hardwood Co. (1905) 2 K. B. 543.

2 Compare the first paragraph of section 73 of the Indian Contract Act with section 50 (2) of the English Act and illustration (c) to Section 73 with section 50 (3); See also Report of the Select Committee.

3 (1854) 9 Exch. 341, 354; 96 R. R. 742.

4 Halsbury, Laws of England, 2nd Edn., Vol. XXIX, page 190.

5 But special circumstances may show that the seller is entitled to greater damages. See the rule in Hadley v. Baxendale, infra.

6 Barrow v. Arnaud (1844) 8 Q.B. 595, 604, 609, 70 R.R. 568, Ex. ch. See also Harishchandra v. Gosho, etc. Ltd., 49 Bom. 33; Meghraj v, Durga Sahai (1926) 54 Cal. 97,

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when the goods ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

In substance, therefore. the provisions of the English Act are the same as those contained in section 73 of the Indian Contract Act and the illustrations thereto, and, though the language is slightly different, both are declaratory of the common law[1].

As already stated, the leading case on the point in England is *Hadley* v. *Baxendale*[2], from which the language of section 73 of the Contract Act seems to have been taken. In that case there was unreasonable delay on the part of the defendant (common carriers) in carrying a broken iron shaft of the plaintiff's flour mill as a result of which the mill could not be worked for some days and the plaintiffs incurred a loss of profit. The only facts communicated to the defendants were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the owners of that mill. Held, under the circumstances, such loss could not be recovered in an action against the defendants as common carriers. "Damages should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it— p. 354.

Market price

The measure of damages on breach by the buyer of goods agreed to be purchased by him is thus in general the difference between the contract price and the market price at the date of the breach. A rise or fall in the market price after the breach cannot affect the buyer[3]. Where the seller alleged that there was no available market for the goods for a period subsequent to the breach, that the goods were consequently sold after the lapse of that period and that the buyer is therefore, liable for the difference between the contract price and the price at which the goods were actually sold the onus lies on the seller of making out that very special case[4]. If there is no difference between the contract and market price the court may award nominal damages.[5] In *Messrs. Mohan Bhasin Share Agency* v. *Khuda Baksh*[6], the buyer agreed to purchase from the seller 200 shares in Heinze Tin Limited, but he broke the contract and refused to purchase the same inspite of seller's notices last of which was dated 29th June 1937 when the market had fallen considerably. The shares however were not resold until 6th September 1937 as the sellers did not give instructions to their brokers to sell them and no reasons were given why they waited so long. *Held*, that in order to succeed the sellers had to show the market price

1 Jamal v. Moola Dawood Sons & Co. (1916) 1 A C. 175, 43 I A. 6, 11, 43 Cal. 493, 498, 31 I.C. 449; Ramalingam v. Gokuldas A.I.R. 1926 Mad. 1021.

2 (1854) 9 Ex. 341, 358.

3 Ibid; British Westinghouse Electric Co. v. Underground Electric Co. (1912) A.C. 62; Keshavlal v. Dewan Chand, A.I.R. 1923 P.C. 105 (P.C.)=47 Bom. 563=74 I.C. 396.

4 Ramalingham v. Gokuldas, A.I.R. 1926 Mad. 1021.

5 Prehn v. Royal Bank of Liverpool, L. R. 5 Exch. 92 (93).

6 A.I.R. 1939 Lah. 260, A.I.R. 1915 P. C. 48 relied on.

at the date of the breach or at the date of sale affected as soon as reasonably possible after the breach and that the sellers were holding the shares in the hope of a rise, and hence the speculation was of the sellers and not of the buyers.

Ordinarily the general rule contained in section 73 of the Indian Contract Act is satisfied by ascertaining the difference between the value of the goods at the time of the breach and the contract price, and, if there has been a resale by the seller, the resale price is taken as evidence of the value.[1] If the subject-matter of the contract is not marketable at the place of delivery. the market price at the nearest place, less the cost of transport of thither or the price prevailing in the controlling market, or the price at the final destination of the goods, may be taken into consideration[2]. Or the price for a brief period before or after that time[3], Or the value of the nearest substitute may be taken[4]. If no substitute is available the re-sale price is assumed to furnish the proper measure of damages where the goods have been re-sold[5], except in cases where the re-sale is not held within a reasonable time after breach[6]. If there has been no re-sale the market value may be ascertained by adding to the price of the goods at the place where they were purchased the cost of carrying them to their place of destination and the usual importer's profits[7]

If delivery is to be made in a foreign country, the measure of damages is to be ascertained by reference to the market price of the goods at that place. The figure then has to be arrived at expressed in the currency of that country, which must then be translated into Indian currency, and the rate of exchange must be the rate prevailing at the date of the breach[8].

The buyer who gives notice of his intention not to accept cannot diminish the damages on the ground that the seller is bound to accept the repudiation as a breach.[9] The seller may hold him to the contract and wait for the appointed time of performance.[10] He is also free to accept the repudiation as an immediate breach and the damages are then measured as on the date of the seller's acceptance of the repudiation.[11] There is, however, a tendency to modify the hard and fast rule that damages must be assessed with reference to

1 Ellis, Lever & Co. v. Dunkirk Colliery Co., 48 L T. 706 H.L.; Strand v. Austin & Co. (1883) Cab. & El 119; Jugmohan Das v. Nusserwanji Jehangir, 26 Bom 744.

2 Wartheim v. Chicoutimi Pulp Co. (1911) A.C. 301 P.C.; Ramalingam v. Gokul Das, 1926 Mad. 1021.

3 Cohen v. Pratt, 69 N.Y. 348 (352).

4 Hinde v. Liddell, (1875) 10 Q.B. 265; Elbinger v. Armstrong (1874) 9 Q.B. 473.

5 Maclean v. Dunn (1828) 130 E.R. 947; 29 R.R. 714; Ex parte Stapleton (1879) 10 Ch. D. 586, C.A.; Ryan v. Ridley (1902) 8 Com. Cas. 105.

6 See Mohan Bhasin v. Khuda Baksh, supra.

7 Borries v. Hutchinson (1865) 18 C. B. N. S. 445; 144 R. R. 563; Cooverjee v. Rajendra (1909) 36 Cal. 617; Hajee Ismail v. Wilson (1918) 41 Mad. 709, 715.

8 Di Ferdinando v. Simon Smits & Co. (1920) 3 K. B. 409, 414, 415, C. A.

9 Frost v. Knight, L. R 7 Exch. 111 (113); Roper v. Johnson, L. R. 8 C. P. 167.

10 Michael v. Hart & Co. (1902) 1 K. B. 482 C. A.; Tredegar Iron & Coal Co. v. Hawthorn Brothers & Co. 18 L. T. R. 716 C. A.; Maharaja Mahendra Chandra v. Aswani Kumar, 32 Cal. L. J. 168.

11 Shaw's Brow Iron Co. v. Birchgrove Steel Co. 6 T. L. R. 50 C. A.; affirmed in 7 T. L. R. 24 (H. L.) Maharaja Chandra v. Aswani Kumar, supra.

the original date of performance.[1] Where a defaulting purchaser delays to take delivery of goods purchased by him, resulting in the deterioration of the goods in the ordinary course of things, *e.g.*, by rainfall, he has to compensate the seller for any loss occasioned by reason of such delay, even though the property in the goods did not pass to him.[2] But a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and connot claim as damages any sum due to his own neglect[3]. Even in a contract subject to a condition that the plaintiff may upon a breach of it treat it as cancelled and not ask for damages, the defendants, in order to escape liability for damages are bound to justify their refusal to perform the contract since they cannot themselves bring about the state of affairs which would avoid the contract[4].

If there is no market for the goods the seller is entitled to be put in the same position as if the contract had been carried out. Where there is non-acceptance of goods made to order, there being no available market, the seller is entitled to profit which he would have made if the contract was carried out.[5] In *Whitaver* v. *Bowater*[6] there was sale of coal slack. On default by the buyer, the seller, who had entered into a contract with a coal merchant to supply him with coal, cancelled the contract with the merchant by paying him damage, as there was no market for the particular kind of coal in question. Held, the seller had acted reasonably and was entitled to recover from the buyer in addition to his own damage the amount which he had to pay to the coal merchant.

Date for ascertaining the damages

The date with reference to which damages have to be assessed will be the date fixed for performance by delivery and acceptance as fixed by the contract or, where no time is so fixed, at the time of the refusal to perform[7]. The contract may provide a certain period during which delivery is to be made, such as a named fortnight or month, and in such a case, in the event of a failure to deliver, the last day of such period is the day on which the breach must be taken to have occurred and therefore the day on which to assess the damages[8]; while if delivery is tendered at any time during that period and refused, the date of that refusal is the date of breach. Where time is fixed by reference to the happening of an event, such as the arrival of a ship, the time is still fixed by the contract and the time at which the contract ought to have been performed is on the happening of that event[9].

What is the position when no time is mentioned and the contract therefore is to be performed within indefinite period? Under

1 Roth & Co. v. Tayson, 1 Com. cas, 306 C. A.

2 Tara Chand v. Louis Dreyfus & Co. 35 I. C. 449 (Sind).

3 Jamal v. Moolla, supra,

4 Shahabuddin v. Vilayat Ali Khan, 95 I. C. 614 (Nag.)

5 Re. Vice. Mills Ltd. (1913) 1 Ch. 405.

6 (1918) 35 T. L. R. 115.

7 Mackertich v. Nobo Kumar, (1903) 30 Cal. 477 Sharpe v. Nosawa (1917) 2 K. B. 814 (C. I. F. contract—date is the probable date when the documents will be ready); Melachrino v. Nickoll (1920) 1 K. B. 693 (date fixed by reference to the happening of an event). Cf. Steel Brothers Ltd. v. Dayal Khatoo & Co. (1923) 47 Bom. 924=A. I. R. 1924 Bom. 247=87 I. C. 67.

Mackertich v. Nobo Coomar Roy, supra.

Melachrino v. Nickoll and Knight, supra.

the English law, in *Chapman* v. *Lerin*[1] the times of delivery were indefinite, and at the option of the buyer. He had on May 7 agreed to buy 500 tons of hay f.o.b. a propeller on the canal "at such times and in such quantities" as he should order, each lot to be paid for on delivery. The buyer took delivery of 147 tons, and then refused to accept any more. After several requests by the seller, the plaintiff, a formal request was made on July 28 by the plaintiff, who brought his action on November 11. *Held*, that the action lay for the difference in value in respect of all the undelivered residue, as the defendant was bound to order the hay at reasonable times, and a reasonable time for delivery of the residue was July 28 when the new hay crop was coming into the market.

Again, it has been suggested under the English law that the words "where no time is fixed" apply only to a case where the contract is to deliver goods "on demand" or "as required by the buyer" and do not include a case where the time for performance can be fixed by a jury, as it can be when performance is to be within a reasonable time.[2]. The question is still open.

In India, when no time is mentioned, the case must be treated as one in which no time is fixed, as would appear to be clear from illustrations (*c*) and (*d*) to section 73 of the Indian Contract Act. The same view has been held in England also[3], though as mentioned above, the point is still open. In India, in cases where the contract is to be performed within a reasonable time, if either party before the expiration of that time and before anything has been done under the contract announces his intention of refusing to proceed with the contract, the day on which he so announces his intention must be taken as the time for assessing the damages, though this rule can scarcely be applied in its entirely to cases where the contract is to be performed by delivering the goods in instalments. If before the expiration of the reasonable time either the buyer applies for delivery and the seller fails to deliver or the seller tenders delivery and the buyer fails to accept, such failure would, in either case, amount to a refusal to perform and the day for assessing the damages would be the day on which such refusal has occurred[4].

The time appointed for delivery may or may not, however, coincide with the date of the buyer's breach of contract. For example, the buyer may, in advance, intimate his intention not to accept the goods, in other words. repudiate the contract, and the seller may or may not accept the repudiation as an immediate breach[5].

The law with respect to prospective breaches of contract, and the measure of damages, was thus stated by Cockburn, in *Frost* v. *Knight*:[6]

1 (1879), 4 Can. S. C. R. 349.
2 Millett v. Van Heek Co. (1921) 2 K. B. 369, pp. 375, 376, 378.
3 Melachrino v, Nickoll & Knight, supra, at p. 696, Bailhache, J.; See also Ashmore & Sons v. C. S. Cox & Co. (1899) 1 Q. B. 448.
4 See Pollock and Mulla, Sale of Goods Act, p. 294, citing Shriram Vithuram v. Trimbak Amolckchand, A.I.R. 1927 Bom. 514=103 I C. 645,
5 Per Cur. in Frost v. Knight (1872), L. R. 7 Ex. 111, at 112-113; per Lord Esher, M.R. in Roth v. Taysen (1896), 12 T.L.R. 211 (C.A.).
6 (1872) L.R. 7 Ex. 111.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed. and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities uder it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful puting an end to the contract, and may at once bring his action as on a breach of it it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In *Bowman* v. *Nash*[1], the plaintiff, in November, 1825, sold goods to the defendant, deliverable in the months of February and March following. The defendant became bankrupt in January. The goods were tendered and not accepted at the dates fixed by the contract, and resold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, on the buyer's bankruptcy. *Held*, that the contract was not rescinded by the bankruptcy, that the assignees would have had the right to adopt it, that the seller was not bound to resell before the time for delivery, and that the damages were to be calculated according to the market price at the dates fixed by the contract for performing the bargain.

In *Phillpotts* v. *Evans*[2] there was a sale by merchants at Gloucester of a quantity of wheat deliverable at Birmingham as soon as vessels could be obtained The market began to fall and while the wheat was on its way the buyer intimated that he would not accept it. On arrival it was tendered to him and rejected. The time for ascertaining the damages for nonacceptance was held to be the day on which the wheat was tendered.

If the seller accepts the buyer's repudiation as an immediate breach, he must act reasonably by way of minimising the loss caused thereby. Whether or not he acts reasonably is a question of fact[3].

But the seller is not bound to accept the buyer's repudiation, even when it is obvious that the buyer cannot carry out the contract at the date fixed[4]. Thus in *Tredegar Iron & Coal Co.* v. *Hawthorn*[5] where coal was sold only for export, deliverable during February, and the buyer, no shipping being procurable, repudiated the contract in that month, at which time the seller could have resold without loss, it was held by the Court of Appeal that the seller was not bound to minimise the buyer's loss by accepting the repudiation in February, but might stand by his bargain; and having resold in March at a loss of a shilling a ton might recover that deficiency.

Extension of time

Where the time for performance is fixed by the contract but extended and another date substituted for it by the agreement of the parties, the substituted date must be taken as the date for ascertaining

1 9. B. & C. 145; 32 R.R. 607; cf. Cohen v. Cassim Nana (1876) 1 Cal. 264.
2 (1839) 5 M. & W. 475; 52 R.R. 802.
3 Per Mathew J. in Roth v. Taysen, 73 L.T. 628 (C.A.); 1 Com. Cas. 306; 12 T.L.R. 211.
4 See as to this section 60.
5 (1902) 18 T.L.R. 716 (C.A.).

the measure of damages[1]. It has been held under the Indian law that an agreement to postpone performance for an unspecified time operates as an extension for a reasonable time, and consequently the date to be taken must then be a date at which there appears to be a failure or refusal to perform[2]. If the time has not been postponed by the agreement, the time fixed by the contract is still the date at which to ascertain the damages[3].

Where damages are payable in a foreign currency they are such a sum in Indian currency as will, at the rate of exchange prevailing at the date of default with respect to which the damages are to be assessed, but not at the time of judgment or award, produce the sum in foreign currency[4]. Fluctuations in the rate of exchange therefore do not affect the parties. Similarly, if the buyer refuses to accept and the seller retains the goods, the buyer cannot be held responsible for any further loss should the market fall nor entitled to have the damages reduced if it rises[5].

The following further illustrations may also be studied with advantage:— Illustrations

(1) There was a sale of 250 bales of manilla hemp, shipment to be made from port or ports in the Phillipine Islands by sailor or sailors between May 1st and July 21st. The sellers shipped hemp by a steamer in September, which would arrive at about the same date as a cargo shipped on a sailor between May and July, and on October 27th declared it agains the contract. The buyers refused to accept the declaration and returned it, but on November 4th the sellers said that they could make no other. The date for assessing the damages was held to be November 4th[6].

(2) In *Leigh* v. *Paterson*[7] a quantity of tallow was sold to be delivered in all December. On the 1st October the seller announced that he would not deliver, but the buyer refused to accept his repudiation. The market price rose between the 1st October and 31st December. *Held*, that the day for ascertaining the damages was the 31st December.

(3) In *Jamal* v. *Moola Dawood Sons & Co.*,[8] there was a sale of shares deliverable on 30th December. They were tendered on that day and rejected. *Held*, that the measure of damages is the difference between the contract value of the shares and their market

1. See sections 55 and 63 of the Indian Contract Act, 1872.
2. Mohammad Habib Ullah v. Bird & Co. A.I.R. 1922 (P.C.) 178=(1921) 48 I.A. 175, 43 All 257=63 I.C. 589; Kidar Nath Behari Lal v. Shimbhu Nath-Nandu Mal, A.I.R. 1927 Lah. 176=8 Lah 198=99 I.C. 812; Coorla Mills v Vallabhdas, A.I.R. 1925 Bom. 547=94 I.C. 575.
3. Mutthaya Maniagaram v. Lekku Reddiar (1912) 37 Mad. 412=14 I.C. 255; Narsinggirji Manufacturing Co. v. Budansaheb Abdulsaheb Kaji, A.I.R. 1924 Bom. 390.
4. Barry v Van den Hurk (1920) 2 K.B. 709; Di Ferdinando v Simon Smits & Co (1920) 3 K.B. 409, 414, 415, C.A.
5. Jamal v. Moola Dawood Sons & Co., supra. Collateral circumstances will not alter the rule; Bolisetti Venkatanarayana v. Vekkiagaddalakshimal Puunayya A.I.R. 1928 Mad. 1232=115 I.C. 1342 cf. Mehr Chand v. Jugal Kishore-Gulab Singh, 85 I.C. 317.
6. Ashmore & Sons v. C. S. Cox & Co. (1899) 1 Q.B 436.
7. (1818) 8 Taunt. 540, 20 R.R 552; cf Mackertich v. Nobo Coomar Roy (1903) 30 Cal. 477.
8. (1916) 1 A.C. 175.

value on that date. The fact that they were resold at an increased value subsequently is irrelevant.

(4) In *Brown* v. *Muller*[1] 500 tons of iron were sold in August to be delivered in about equal proportions in September, October and November. Later in August the seller gave notice that he did not intend to deliver; the buyer demanded delivery in October of 200 tons "as per contract," and on the 4th December bought against the seller: *Held*, that the proper measure of damages was the difference between the market price and the contract price of one-third of 500 tons on the 30th September, 31st October and 30th November.

(5) A, a stockbroker, closed the account of a client B prematurely and without instructions, instead of carrying it over to the next settlement as on the facts and the true coustruction of their agreement he ought to have done. B informed A that he insisted on the performance of the contract. *Held*, A cannot claim to have the damages assessed with reference to the price of the stock at the date of closing the account, but B is entitled to claim damages assessed according to the price at the date fixed for performance[2].

Delay in resale by seller-speculation.

(6) Buyer agreed to purchase from seller 200 shares in Heinze Tin, Limited. but he broke the contract and refused to purchase the same inspite of seller's notices last of which was dated 29th June, 1937, when the market had fallen considerably. The shares, however, were not resold until 6th September, 1937, as the sellers did not give instructions to their brokers to sell them and no reasons were given why they waited so long. Held, that in order to succeed the sellers had to show the market price at the date of the breach or at the date of sale effected as soon as reasonably possible after the breach and that the presumption was that the sellers were holding the shares in the hope of a rise, and hence the speculation was of the sellers and not of the buyers[3].

Sale of a decree.

(7) In the case of a sale of a decree in which the seller is not to have any right to proceed to execute the decree from the time of the transaction and the buyer is given the liberty to take steps to realise the decree at his cost at any moment. it cannot be said that the agreement is subject to an implied condition that the decree should remain capable of execution; in other words it cannot be said that the parties regard that the terms are subject to any implied condition that the debtor should remain solvent. If therefore the judgment-debetor becomes insolvent before the payment of the sale price and the formal execution of a deed of assignment in writing, it cannot be said that contract of sale becomes "impossible" and so void under section 56 (2) of the Act.[4]

As already noted, the seller has various remedies both against the goods and the buyer personally, and in many cases where

1. (1872) L. R. 7 Ex. 319; cf. Cooverjee Bhoja v. Rajendra Nath (1909) 36 Cal. 617=21 C. 831; Bilasiram Thakurdass v. Gubbay (1915) 43 Cal. 305=33 I. C 23.
2. Michael v. Hart & Co. (1902) 1 K. B. 482, C. A. There was a suggestion that the damages might be fixed according to the highest price reached in the interval.
3. Mohin Bhasin Share Agency v. Khuda Baksh, A. I. R. 1939 Lab. 260=184 I. C. 43.
4. Vithaldas Vishram v. Jagjivan Gordhandas, A. I. R. 1939 Bom. 94=41 Bom. L. R. 33.

those remedies exist he still has the option of availing himself of the remedy declared by this section[1].

Mitigation of damages.

It is a recognised principle of law that a party to a contract entitled to any damage must not aggravate the damage by any unreasonable conduct on his part; he must like a prudent man use ordinary and reasonable diligence to minimise the damage as much as possible; but no extraordinary duties are imposed on him. "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach. and debars him from claiming any part of the damage which is due to his neglect to take such steps; this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.[2]"

Subsequent transactions may be taken into consideration in mitigation of damage, but such transactions must arise out of the consequences of the breach and in the ordinary course of business (p. 690). The mere fact that the benefit of another contract has occurred in favour of the plaintiff owing to the default of the defendant is not enough.[3]

It was observed by the Privy Council in *Jamal* v. *Moolla Dawood Sons. & Co.*,[4] "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Stainforth* v. *Lyall*[5] is an illustration of this. But the fact that by reason of the loss of the contract which this defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the later contract." In *Muhammad Habibullah* v. *Bird & Co.*,[6] in an action for damage for non-delivery of goods the fact that the buyer made a profit by supplying goods which he had in stock to his sub-purchaser was not taken into consideration. In *Wertheim* v. *Chicoutini Pulp Co.*[7] it

1 See Coorla Mills v. Vallabhdass, A. I. R 1925 Bom. 547=94 I. C. 575=(1925) 27 Bom. L. R. 1168.

2 Per Lord Haldane, L. C. in British Westinghouse Electric etc. Co. v, Underground Electric Ry. Co. (1912) A. C. 673 (689).

3 See Yates v. Whyte (1838) 7 L. J. C. P. 116; Jebson v. E. & W. India Dock Co. (1875) L. R. 10 C. P. 300; See Hill v. Showell & Sons (1918) 87 L. J, Q. B. 1106 where the law is discussed at some length.

4 (1916) 43 I. A. 6 at p. 10=43 Cal. 493 at p. 502=31 I C. 949.

5 (1830) 7 Bing. 169.

6 (1921) 43 All. 257 P. C. See also Damingo v. De Souza (1928) 50 All. 695; Ramgopal v. Dhanji, 55 I. A. 209.

7 (1911) A. C. 301.

was held that in case of late delivery the measure of damage in order to indemnify the purchaser is the difference between the market prices at the respective dates of due and actual delivery, but if the purchaser has resold the goods at a price in excess of that prevailing at the date of delivery he must, in estimating his damage, give credit therefor. The above case was distinguished in *Williams Bros.* v. *Agius*[1] which was case of non-delivery and not delayed delivery, where the sub-contract was not taken into consideration. In *James Finlay & Co.* v. *N. Y. Kwik Tong*[2] it has been held that the buyer is not bound to enforce, for the purpose of mitigating the damages, contracts with his sub-purchasers (which he might legally do) if to do so, after he knew that his seller had committed a breach of contract (by giving a wrong date of shipment on the bill of lading) would seriously injure his commercial reputation. In that case the buyer could have enforced his cotnracts with his sub-purchasers who were, under their contracts, bound to take the date of shipment as given on the bill of lading as conclusive and in that case there would have been no damage. But as the buyer knew that the date of shipment was wrongly given the adoption of that course would have ruined his credit in the business world.

In *Payzu Ltd.* v. *Saunders*[3] the buyer made default in payment of 1st instalment when due, whereupon the seller refused to deliver unless cash payments were made at the time of the order. The buyer refused this offer and the market having risen sued for damage for non-delivery. Held, the seller was wrong in imposing the condition but that the buyer should have accepted the goods to mitigate the loss and the buyer was entitled to recover such loss which he would have suffered if he had accepted the goods.

Damages for non-delivery.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

This section is based on section 51 (1) of the English Act (Appendix A). Sub-sections (2) and (3) of that section are not reproduced in the present Act, as sections 73 and 74 of the Indian Contract Act contain general provisions relating to the measure of damages on a breach of contract, which are applicable to contract for the sale of goods in common with other contracts.

Buyer's remedies before delivery of the goods.

The breach of contract for which the buyer may have to take action may arise from the seller's default in delivering the goods or from some defect in the goods tendered or delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of a condition or warranty either of quality or title.

Where the property has not passed to the buyer, it is obvious that his remedy for the breach of the seller's promise to deliver is the same as that which exists in all other cases of breach of contract.

1 (1914) A. C. 510, 522.
2 (1929) 1 K. B. 400.
3 (1919) 2 K. B. 581.

He may recover damages for the breach, but has no special remedy growing out of the relation of seller and buyer.

The buyer has obviously three remedies open to him in the case of wrongful non-delivery of the goods, *viz* (1) a suit for damage for non-delivery, this remedy being open to him in every case even when the property has passed to him[1]; (2) a suit for specific performance where the goods contracted to be sold and delivered are specific or ascertained[2]; (3) when the property in the goods has passed, a suit in detinue, trover, or conversion. Of course, in the last case the buyer must be entitled to the immediate possession of the goods.

Measure of damages.

The damages which the buyer may recover in an action under this section are in general the difference between the contract price and the market value of the goods at the time when the contract is broken,[3] and are not increased or lessened by subsequent circumstances[4], and the same principles as govern assessment of damages under the previous section apply under the present section also. The rule as to the market price, perhaps, is not always quite so satisfactory as it is in the case of the buyer's refusal to accept, and may produce hardship in individual cases[5], but it is the one adopted being considered convenient generally.

The rule does not appply when there is repudiation of the contract before the time for delivery. The buyer may obtain only a nominal damage if there is no difference between the contract price and the market price on the date or breach.[6]

The rule as to the market price is also inapplicable when the contract privides that the damages are to be ascertained with reference to a price to be settled by a certain association.[7]

In the Sale of Goods Act there is nothing inconsistent with S. 73 of the Contract Act and hence it must be taken to apply. Section 73 makes it clear that damages for a breach of a contract must be based on the market price ruling at the date of the breach and since the stipulation that delivery should be given as and when the goods arrive in Madras amount to a contract for delivery on the date of their arrival in Madras breach shall be deemed to have been committed on that date.[8]

1 Section 57; Barnet v Javeri (1916) 2 K B. 390.
2 Section 58
3 Barrow v Arnaud, (1846) 8 Q B. 604, 70 R. R. 568; James Finlay v. Knik Hoo Tong (1929) 1 K. B. 400; Keshavlal v. Diwan Chand, 47 Bom 563.
4 Di Ferdinando v. Simon (1920) 3 K. B. 409; Barry v. Van den Hurk 2 (1920) 2 K. B. 709.
5 See Brady v. Oastler (1864) 3 H. & C. 112, 140 R R 338; Hajee Ismail & Sons v. Wilson & Co. (1918) 41 Mad. 769=45 I. A. 942 cf. illustration (a) to section 73 of the Indian Contract Act, under which he is entitled to recover the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered.
6 Millet v. Van Heek & Co (1921) 2 K.B. 369; Valpy v. Oakley (1851) 16 Q B. 941; Taylor & Sons v. Bank of Athens (1922) 91 L.J.K.B. 776: no difference between the value at the time of agreed shipment and actual shipment.
7 See Lancaster v. Turner & Co. (1924) 2 K.B. 222 for contract of London Corn Trade Association In Pl. Bourglois, etc. (1920) 25 Com. Cas. 260: price for ascertainment of damage to be fixed by arbitration; the buyer's ordinary rights are not taken away.
8 B. Muniswami Chetty & Co. (Firm) v. D. Muniswami Chetty & Co. (Firm), A.I.R. 1944 Mad. 418.

Where goods are paid for at the time of purchase and the seller fails to deliver them the purchaser is entitled to recover the purchase money with interest from the date when it was paid till judgment in the suit for damages filed by him. The purchaser would also be entitled to damages for breach of contract on the usual basis-the measure of damages being the difference between the contract rate and the market rate prevailing at the date of the breach and not at the time of the trial[1].

For special damages see notes under section 61 infra.

Price pre-paid.

Payment of the price, without a reservation of a right to damages, is not of itself a waiver of that right[2]. Where the price has been pre-paid, wholly or in part, but the goods not delivered, the buyer's damages for non-delivery should be measured by the difference between the contract and the price on the date of the breach, though it may be argued that in such a case the buyer has not got the money in his hands and cannot therefore go into the market and buy; and in conformity with this argument it has been ruled at *nisi prius* that the buyer's damages for non-delivery should be measured by the difference between the contract price and the price ruling at the time of the trial[3]. It has, however, been observed that the better view appears to be that even so the date to be taken is the date of the breach, and in addition to recovering the difference between the market and contract price on that date, the buyer may also recover the price pre-paid with interest[4].

Goods not obtainable in the market.

The exact sort of goods the buyer has contracted for may not be obtainable, but if it is reasonable for him to buy in similar goods he may charge the seller with the difference in price[5]. Where no such substitute is available then, if there has been a contract to resell the goods, the price at which that contract was made will be evidence of their value, and the buyer can recover the difference between that price and the price at which he bought them from the defaulting seller. If there has been no such contract, the market value may be estimated by adding to the price of the goods at the place where they were purchased the costs and charges of getting them to their place of destination and the usual importer's profits[6]. In *Borries* v. *Hutchinson*,[7] where there was delay in delivering

1 Rameshwardas Poddar v. Paper Sales, Ltd., A.I.R. 1944 Bom. 21; Elliot v. Hughes (1863) 3 F. & F. 387 not followed; Startup v. Cortazzi (1835), 2 Cr. M. & R. 165 approved.

2 Clyde Bank Eng. Co. v. Don Jose Castanda (1905) A. C. 6.

3 Elliot v. Hughes (163) 3 F. & F. 387; Shepherd v. Johnson (1802) 2 East. 211.

4 Chalmers, Sale of Goods Act, 11th Edn., p. 134; Pollock and Mulla, Indian Sale of Goods Act, p. 300; Startup v. Cortazzi (1835), 2 Cr. M. & R. 165. As to the buyer's right to recover interest; see section 61.

5 Hinde v. Liddell (1875), L. R. 10 Q. B. 265, 269; Elbinger Actien Gesellschafft v. Armstrong (1874) L. R. 9 Q. B. 473, 476; Monte Vide Gas etc. Co. Clan Line Steamer, (1921) 37 T. L. R. 866.

6 O'Hanlan v. G. W. Ry. Co. (1865) 6 B. & S. 484, 141 R R. 482; Cooverjee Bhoja v. Rajendra Nath (1909) 36 Cal. 617 = 2 I. C. 831; cf. Jagmohandass v. Nusserwanji (1902) 26 Bom. 744; Patrick v. Russo British Grain Export Co. (1927) 2 K. B. 535; See also I. L. R. 26 Bom. 235; Eric Country etc. Co. v. Carroll (1911) A. C. 105, 107; failure to supply gas the cost of procuring the same could be recovered.

7 (1865) 18 C.B.N.S. 445, 465.

caustic soda, an article not kept in stock, in assessing damages the value of the goods at the time when they ought to have been and at the time when they actually were delivered was taken into consideration. In *Grebert* v. *Nugent*[1] the buyer was allowed compensation for the loss of profit sustained by him and also damages he had to pay to his sub-purchaser on account of the failure of the seller to supply the goods, the seller having notice of such sub-sale. In *Haji Ismail* v. *Wilson & Co.*[2] costs of procuring the goods from the most convenient market (sugar from Java) were allowed. In *Stroms Brucks* v. *John and Peter*,[3] the measure of damages was with reference to the value of the goods at the time and place at which they ought to have been delivered. In *Macauley* v. *Morgan*[4] there being no market at the place of delivery the market price of the nearest convenient place was taken. In *Sharpe & Co.* v. *Nowsa & Co.*[5] in case of nondelivery of goods of a particular shipment from Japan the buyer would act reasonably by purchasing on the spot and the price of such goods should be regarded in measuring damage. In *Watts* v. *Mitsui & Co.*[6] market-price at the destination of the goods was taken.

Sub-contract of buyer.

It is an established principle of the law of damages that circumstances not arising naturally out of the transaction, but peculiar to the plaintiff, will not be taken into consideration so as to enhance or to diminish the damages payable by the defendant. Such circumstances are *res inter alios acta*. "It is well settled that in an action for non-delivery or non-acceptance ....the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods[7]." So, where the buyer used other goods to fulfil a sub-contract and thereby made a greater profit than if he had received delivery from the seller, the greater profit was not taken into account in an action against the seller[8].

It was observed in *Finlay & Co.* v. *Kwik Hoo Tong Handel Maatschappij*[9] :

"As a general rule sub-contracts entered into by a buyer cannot be used to increase or minimize his damages, as the sub-contracts are incidental matters with which the seller had nothing to do I find that laid down in *Rodocanachi* v. *Milburn*[10] which was affirmed in *William Bros.* v. *Agius*[7]......This Court in *Slater* v. *Hoyle & Smith*[11] applied the same principle, that unless the seller contemplates the possibility of a sub contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages. This was one of the many instances in English law where the measure of damage did not give the real loss suffered by the party.

1 (1885) 15 Q.B.D. 85.
2 (1918) 41 Mad. 709.
3 (1905) A.C. 575, 524.
4 (1925) 2 I.R. 1.
5 (1917) 2 K.B 814.
6 (1917) A.C. 227.
7 Per Lord Esher, M. R. in Rodocanachi v. Milburn, (1886) 18 Q.B.D. 67 approved in Williams v. Agius (1914) A. C. 510; See also Grebert Borgins v. Nugent (1885) 15 Q.B.D. 85, 90.
8 Sheikh Mohammad v. Bird (1921), 37 T.L.R. 405 (P.C.). Had the seller supplied the goods, the buyer would have made the profit he claimed and had the other goods as well.
9 (1929) 1 K.B. 400, C.A., at p. 411, Scrutton L J.
10 Supra.
11 (1920) 2 K.B. 11 (breach of warranty).

The same rule applies where the seller knows generally that the buyer requires the goods for re-sale[1]. As regards claim for special damages, notes under section 61 of the Act may be consulted. In *Horne* v. *Midland Ry. Co.*[2] it was held that knowledge of a sub-contract does not necessarily import knowledge of all its terms. The view that the defendant company was put on enquiry as to the nature of the sub-contract was not accepted by the majority. In *Hall* v. *Pim*[3] it was held that the material date of ascertaining what was in the contemplation of the parties was the date when the contract was made and not the date when the goods were appropriated to the contract. There the seller knew that the goods might be passed on by way of subsale if the buyer did not choose to keep them for himself ; on failure by the seller to deliver the buyer is entitled to recover the loss of profit, though the buyer is under an obligation, on failure by the seller, to buy similar goods from the market to fulfil his contract. In *Patrick* v. *Russo Br. Grain Co*[4]., where at the time of seller's default there was no market for the goods, it was held that the buyer was entitled to recover the difference between the contract price and the price at which the buyer resold them.

Where there is a chain of sellers and buyers the damages are ascertained between the last buyer and seller would probably, without further litigation, form the measure of damage to be recovered all along the chain[5].

Delay in delivery.

In the case of delay in delivery also, the *prima faice* rule is that the damage is the difference between "the value of the article contracted for at the time when it ought to have been and the time when it actually was delivered[6]." In *Wertheim* v. *Chicoutimi Pulp Co*[7], where delivery was delayed, the Privy Council were of opinion that the value of the goods at the time of actual delivery was the price at which the buyer had resold the goods, that being their value to him, and as this price was much higher than the market price at the time of delivery. the buyer's damages were held to be the difference between the resale price and the market price at the time appointed for delivery, and not the difference between the latter price and the market price at the time of actual delivery. It was observed :

"(If he does not get his goods he) should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or by others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice,

1 Thol v. Henderson (1881) 8 Q.B.D. 457.
2 L.R. 8 C.P. 131.
3 33 Com. cas. 324 H.L.
4 (1927) 2 K.B. 535.
5 Hope Prudhomme & Co. v. Hamel, 108 I.C. 807 ,P.C.
6 Elbinger Actien Gesellschaft v. Armstrong (1874), L.R. 9 Q.B. 473, at p. 477, per Blackburn J. cf. Illustration (*g*) to section 73.
7 (1911) A.C. 301; 80 L.J.P.C. 91.

to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position."

Although this case was distinguished in *Williams* v. *Agius*[1] and *Slater* v. *Hoyle*[2] from cases of non-delivery, yet it is difficult to reconcile it with the principle of *Rodacanachi* v. *Milbunr*[3], according to which the resale price should have been regarded as an immaterial factor; and Court of Appeal in *Slater* v. *Hoyle* was evidently of opinion *obiter* that the decision was a wrong one[4].

"It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed," and the rule as to market price "is intended to secure only an indemnity" to the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser."

The rule stated above must, however, be taken as only applying to cases of late delivery. "When there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day and, barring special circumstances, the defaulting seller is neither mulet in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price (*Great Western Railway Co.* v. *Redmayne*[5]) nor can he take benefit of the fact that the buyer has made a forward resale at under the market price[6]."

The time for delivery may have been extended at the seller's request. It that case the extended time or a reasonable time thereafter will be taken as the contract time[7]. In the case of instalment contracts the damages must *prima facie* be calculated with reference to the market price at the time for the delivery of each instalment[8].

Where the seller delivers the goods later than the contract time and the buyer accepts them, the measure of damages is *prima facie* the difference between the value which the goods would have had at the place of delivery if they had been delivered in due time, and the value which they had at that place when they were delivered[9].

The rule for the calculation of damages by the market price at the date of delivery does not apply where the parties in their contract

1 (1914) A.C. 510; 83 L.J.K.B. 715.
2 (1920) 2 K.B. 11; 89 L.J.K.B. 401 (C.A.)
3 (1886) 18 Q.B.D. 67.
4 See Benjamin on Sale, 7th Edn, page 1008.
5 (1865) L.R. 1 C.P. 329.
6 Williams Bros. v. Ed. T. Aguis Ltd. (1914) A.C. 510, 522—523 per Lord Dunedin: cf. Muhammad Habib Ullah v. Bird & Co. (1921) L.R. 48 I.A. 175 =A.I.R. 1922 (P.C.) 178=63 I.C. 289 =43 All. 257.
7 Ogle v. Earl Vane (1868), L.R. 3 Q.B 272; Wilson v. London & Glove Cox (1897) 14 T.L.R 15; Hickman v. Haynes (1875) L.R. 10 C.P. 598; Kidar Nath v. Shimbhu (1927) 8 Lah. 198; Macaulay v. Morgan (1925) 2 I.R. 1; non-delivery when no time was fixed for delivery.
8 Brown v. Muller (1872) L.R. 7 Exch. 319; Roper v. Johnson (1873) L.R. 8 C.P. 167.
9 Halsbury, Laws of England, 2nd Edn, Vol. XXIX, p. 198.

may have provided that in case of breach certain agreed damages should be paid by the party in default.

Specific performance

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the court may deem just, and the application of the plaintiff may be made at any time before the decree.

This section is based on section 52 of the English Act, (Appendix A). As the principles relating to specific relief in India are contained in the Specific Relief Act, 1877, the provisions of this section are expressly made subject to that Act.

Specific performance.

This section applies to all cases where the goods are specific or ascertained whether the property therein has passed to the buyer or not, but unless the goods are specific or ascertained there can be no decree of specific performance[2]. The section provides a remedy for the buyer, and gives no correlative right to the seller: it is therefore only on the application of the buyer, when suing as plaintiff, that the contract of sale can be enforced specifically[3].

"Specific" as defined in section 2 (14) of the Act means 'goods identified and agreed upon at the time a contract of sale is made': while "ascertained" means "identified in accordance with the agreement after the time a contract of sale is made[4]."

The *rationale* of specific performance is the inadequacy of the remedy of damages and the practical impossibility of fixing damages. The jurisdiction to grant specific performance is entirely discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but should be sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.[5] Sections 10 and 11 of the Specific Relief Act, 1877, deal with the mode of recovering possession of movable property, and the cases in which the courts may compel a party specifically to deliver any particular article of movable property to the person entitled to its immediate possession. In accordance with the principles underlying sub-sections (*b*) and (*c*)

Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. (1915) A.C. 79, H.L.

Jones v. Tankerville, (1909) 2 Ch. 440, at p. 445.

In re Wait, (1927) 1 Ch. 606: Thames Sack Co, v. Knowles & Co. (1918) 88 L.J. K.B. 585.

3 In Re Wait, supra.

4 Ibid.

5 See section 22, Specific Relief Act, 1877. See also Cohen v. Roche (1927) 1 K. B. 169 (Definite finding)

of section 11 of the Specific Relief Act, the seller may be ordered to deliver specific or ascertained goods to the buyer to whom the property has passed pursuant to the contract for sale, when compensation in money would not afford the buyer adequate relief for the loss of the goods claimed, or when it would be extremely difficult to ascertain the actual damage caused by their loss.[1] In ordinary commercial contracts neither of these conditions is usually fulfilled, and, indeed, the statutory presumption is that the breach of a contract to transfer movable property can be adequately relieved by pecuniary compensation. The buyer must show that it is a case where damages are not an adequate remedy[2]. Generally it is only in the case of chattels of a peculiar character having a *peculiam affectionis* or special value to the buyer[3] or which are rare[4] not easily or generally available in the market[5] so that the money compensation if granted cannot put the vendee with respect to such chattel in the same position in which he would have been if he had obtained possession of the chattel, that the courts grant such relief.

Illustration to section 12 of the Specific Relief Act provides that a contract to sell railway shares of a particular description may be specifically enforced, for the shares are limited in number and not always to be had in the market. But the same principle does not apply to sales of Government securities which are always available in the market[6]. In *Dominion Co* v. *Dominion Iron & Steel Co.*[7] specific performance was refused of a contract to supply coal of a specified quality which might be obtained elsewhere. In *Bharat* v. *Nisarali*[8] specific performance was refused of a contract to deliver certain heads of buffaloes, there being nothing remarkable about them.

A suit for specific performance will bar a subsequent suit for damages and *vice versa*[9].

The mere fact that the buyer may have paid the contract price in advance, and the seller has subsequently gone bankrupt, does not bring the case within the section. The buyer who gives credit to the seller is in no better position than the seller who gives credit to the buyer[10].

The section provides that the defendant may be compelled to perform the contract specifically, although he may be willing to pay damages for the breach of it[11]. That is to say, the seller cannot purchase the right to commit a breach of the contract of sale on payment of wages. The buyer can claim specific performance and also damages for detention of the goods until delivery[12].

1 See illustration of clause (e), section 11 of the Specific Relief Act, 1877.
2 Specific Relief Act, section 11; section 12, Explanation; Whiteley v. Hilt (1918) 2 K. B. 808, at p. 819, C. A.; Cohen v. Roche, supra.
3 Claringbuild v. Curtes, 21 L.J.Ch. 541.
4 Falcke v. Gray, 4 Drew 458; Donnell v. Bennett, 22 Ch. D. 835.
5 Cutt v. Rutter, 1 P.W. 570; Hawkins v. Maltby, 4 Ch. 100; Paine v. Hutchinson, 3 Ch. 388.
6 See Re Schawabacher, 98 L.T. 127.
7 1909 A.C. 293.
8 (1916) 20 C.W.N. 1020. See also Cohen v. Roche (1927) I.K B. 169; Sale of furniture of no special value; specific performance refused.
9 See Calliangi v. Narsi, 19 Bom. 764: the court awarded damages instead of specifically enforcing the contract.
10 In re Wait, supra.
11 cf. section 20, Specific Relief Act, 1877.
12 See Bullen & Leake's Precedents of Pleading, 7th Edn., p. 220.

Illustrations

(1) In *Behnke* v. *Bede Shipping Co.*,[1] specific performance of a contract for the sale of a steamship was ordered. She was of peculiar and practically unique value to the plaintiff. She was cheap being old, but her engines and boilers were practically new and such as to satisfy the German regulations and enable the plaintiff, a German shipowner, to have her at once put up on the German register.

(2) In *James Jones & Sons Ltd.* v. *Earl of Tankerville*[2] there was a sale of the timber on the seller's land, the buyers to cut it and have leave to saw it up on the seller's land. After a certain amount had been cut the seller repudiated the contract and forcibly prevented the buyer's from cutting or removing any more. The court gave the buyers relief by way of specific performance and granted an injunction against the seller, restraining him from further interfering with the buyers.

(3) In *Thames Sack & Bag Co.* v. *Knowles*[3] there was a contract for the sale of ten bales of hessian bags and the seller merely delivered an invoice giving the marks and numbers of the bales as "10'30 *ex* 6762/6806". *Held*, that the buyer was not entitled to specific performance as the goods were not "ascertained". "*Ascertained* means that the individuality of the goods must in some way be found out, and when it is then the goods have been ascertained."

The Act not concerned with equitable rights.

The Act is not concerned with equitable rights, although it may seem that its provisions must be complete and exclusive statements of the legal relations both in law and equity, since it deals with the rights and obligations of the seller and buyer under the contract of sale very carefullly. This, however, is not the case[4].

Remedy for breach of warranty.

*59. (1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buver has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

1 (1927) 1 K. B. 649.
2 (1909) 2 Ch. 440.
3 (1919), 88 L. J. K. B. 585.
4 See In re Wait, supra, pp. 685—686.

* **Analogous law.**
Sub-sections (1) and (4) of section 53 of the English Sale of Goods Act, 1893.

Remedies for breach of warranty.

A 'warranty' is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but *not* to a right to *reject* the goods and treat the contract as repudiated[1]. The buyer is not, by reason of a breach of warranty, entitled to reject the goods; he may set up against the seller the breach of warranty "indiminution or extinction of the price[2]. A 'condition' is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated[3]. Whether stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract[4]. Section 13, *ante*, lays down the circumstances in which a condition may be treated as warranty.

In the present section the distinction between "condition" and "warranty" has been maintained. It appears from the definition of warranty that a breach of it gives rise to a claim for damages only on the part of the buyer, as he has not the right to reject the goods and treat the contract as repudiated. Similarly, from section 13 it is clear that even in the case of a breach of condition, if the buyer has accepted the goods or in the case of entire contracts, part of them, either voluntarily, or acting in such a way as to preclude himself from exercising his right to reject them, his remedy is to set up a claim for damages as if the breach of the condition was a breach of warranty. The same holds goods where the contract is for specific goods the property in which has passed to the buyer. Of course, this rule is subject to any term of the contract, expressed or implied to treat such a breach as a breach of condition resulting in the repudiation of contract and not merely as a breach of warranty. A buyer may also treat the breach of any condition to be fulfilled by the seller as a breach of warranty only[5].

Where, however, a stipulation which might ordinarily be treated as a warranty is fraudulently made, if may be a ground for rescinding the contract and returning the goods.[6] This conclusion is also pointed out by the words "by reason *only* of such breach of warranty" in sub-section (1).

When the buyer has accepted the goods his only remedy is to claim damages for breach of warranty. If there has been a breach of any condition, by acceptance the buyer treats the breach of the condition as a breach of warranty.

The section is declaratory of the common law and enables the buyer to set up the breach of warranty as a plea for reduction or extinction of the price in answer to a suit by the seller[7]. This is a remedy available by way of defence. Where a buyer elects or is

1 Section 12 (3), ante.
2 Ghulam Mohammad v. Granyer, 42 P. L. R. 172.
3 Section 12 (2), ante.
4 Section 12 (4), ante.
5 Section 13 (1) ante.
6 Gompertz v. Denton (1832) 1 Cr. and M. 207, 209; Clarke v. Dickson (1858) E.B. and E. 148, 113 R.R. 583; Holdsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317, 323, 328.
7 Basten v. Butter (1806) 7 East. 479; Street v. Blay (1831) 2 B. and Ad. 456; Mondel v. Steel (1841) 8 M. and W. 858, 58 R.R. 890; Poulton v. Lattimore (1829) 9 B. and C. 259, 32 R.R. 673 (extinction of price).

compelled to treat a breach of a condition as a breach of warranty, he may counter claim in that case also for damages in the seller's action for the price[1]. The buyer may also sue the seller for damages for breach of warranty. Thus, if the damages exceed the amount of the price he may either counter claim for the excess, or bring an independent action in respect of it, or he may, in all cases, pay the price and bring a distinct action for any damage sustained by reason of the seller's breach[2]. The right of action is not excluded by a provision in the contract that the buyer shall pay in cash after inspection of the goods on their arrival.[3]

The buyer has an alternative right to set up the breach of warranty for the above purposes; but he is not bound to take this course in a suit for price. He may bring a separate suit in respect of damage suffered without taking any defence in the suit for price.[4] No notice of defence is required[5]. The buyer can set up the breach in respect of the price of the same goods or goods covered by the same contract[6].

If the buyer wrongfully rejects the goods and repudiates the contract, he cannot set up a breach of warranty in reduction of the damages when sued for non-acceptance[7]. It was held by the Madras High Court in *Nannier* v *Rayalu Iyer*[8] that the buyer having requdiated the contract on the ground that the goods were not tendered within the time agreed could not afterwards plead non-liability on the ground that the goods were not of the contract quality.

Suit for damage.

The buyer can always bring an action for damage when there has been a breach of warranty, unless he has expressly or impliedly waived the breach.[9] If the warranty was given fraudulently then the buyer on coming to know of it can rescind the contract, unless rescission is not possible under the circumstances of the case.[10]

Further damage.

The buyer by setting up the breach of warranty against the price does not lose his right to claim further damage that he may

1 Khoyee & Co. v. Gordon Woodroffe & Co., A.I.R. 1937 Mad. 40=I.L.R. 1937 Mad. 479=166 I.C. 313.

2 Davis v. Hedges (1871) L.R. 6 Q.B. 687; Amies v. Jal (1923) 25 Bom. L.R 778: where the hirer was allowed damages for breach of warranty and the owner was entitled to damages for breach on the part of the hirer.

3 Khan v. Duche (1905) 10 Com. Cas. 87.

4 Davis v. Hedges (1871) L.R 6 Q.B. 687, 689.

5 See Bright v. Rogers (1917) I.K.B. 917.

6 Bow McLachlan & Co. v. S. Camosun (1909) A.C. 597.

7 Braithwaite v. Foreign Hardwood Co. (1905) 2 K.B. 543, 552, C.A. As to the seller's liability for fraud to a third party, see Langridge v. Levy (1837) 2 M. & W. 519.

8 I.L.R. (1926) 49 Mad. 781, following Braithwaite v. Foreign Hardwood Co., supra; which the court considered to be still good law inspite of the decision of the House of Lords in British Benningtons v. N. W. Cachar Tea Co. (1923) A.C. 48, at p. 70. See, however, Chalmers, Sale of Goods Act, 10th Edn., p. 90 f (n) (s); see also Taylor v. Oakes (1922) 6 T L R. 349, on appeal, ibid. at p. 517; Steel Brothers v. Dayal (1923) 25 Bom. L.R. 1063.

9 See Poulton v. Lattimore (1829) 9 B. & C. 259; Basten v. Butter (1806) 7 East. 479.

10 Clarke v. Dickson (1858) E.R. & E. 148; Houldsworth v. City of Glasgow Bank (1880) 5 A.C. at p. 323; sale of shares caused by the fraudulent misrepresentation of directors.

have sustained. In *Mandel* v. *Steel*[1] the buyer in an action for price of a ship which was not built in terms of the contract set up the defence of the breach of warranty (which was the difference in the value of the ship as she was and what it would have been if completed in terms of the contract). The buyer thereafter brought a separate suit for damages caused for not being able to use the vessel and for effecting subsequent necessary repairs. It was held that the suit was maintainable[2]. But the damages resulting from one and the same cause of action must be assessed and recovered once for all[3].

Measure of damages.

The provisions of section 53 of the English Act relating to the measure of damages are omitted from the present section also, as sections 73 and 74 of the Indian Contract Act contain general provisions as to the measure of damages on a breach of contract which apply to contracts for the sale of goods equally with other contracts. Sub-sections (2) and (3) of section 53 of the English Act laying down the rules, are as follows:—

> "(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.
>
> (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty."

It has been held in *Khaliquzzaman* v. *A.H. Parakh*[4] that in respect of a claim for breach of warranty under S. 59 (1) of the Act, the measure of damages is not the full consideration that has passed from the defrauded party ; it is only the difference between the actual value of the property and its value if the property had been what it was presented to be.

Warranty of title.

When there is a breach of warranty of title and the buyer is deprived of the thing brought he can recover the price if paid and can also ask for damages caused thereby. If the buyer is made liable to a third person for dealing with his goods the seller is bound to indemnify the buyer. In *Rowland* v. *Divall*[5] the buyer of a motor car was dispossessed by the true owner after using it for some time. Held, he wes entitled to recover the full price ; the contract was not for the use of the car but for lawful possession of it.

Warranty of quality.

The general rule as to the measure of damages for a breach of warranty is the same as the first branch of the rule in the leading case of *Hadley* v. *Baxendale* on which section 73 of the Indian Contract Act is founded. This rule excludes the element of the

1 (1841) 8 M. & W. 858.
2 See Rigge v. Burbridge (1846) 15 M. & W. 598
3 See Brunsden v. Humphrey (1884) 14 Q.B.D. 141, 147; Congner v. Boot (1928) 2 K.B. 336.
4 A.I.R. 1939 Oudh 186=180 I.C. 879.
5 (1923) 2 K.B. 500.

defendants's knowledge, his liability depending, not upon the state of his knowledge, but upon the facts of the case.[1]

If the contract is discharged by the breach then the buyer has his remedy as for a breach of contract for non-performance. If the contract is not discharged then the measure of damage is the estimated loss directly or naturally resulting in the ordinary course of events from snch breach, and such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty[2].

In *Dingle* v. *Hare*[3], where twenty tons of super phosphates were sold ot five guineas a ton, guaranteed to contain 30 per cent. of phosphate of lime, it was held that the jury had properly allowed the purchaser the difference between the value of the article delivered and that of the article as warranted, that is to say, the difference between five and two guineas a ton. And in *Jones* v. *Just*[4], the same rule was applied to a sale of manila hemp, and the plaintiff recovered as damages £756, although by reason of a rise in the market the inferior hemp sold for nearly as much as the price given in the original sale.

The contract price, or the special value of the goods to the buyer, is not to be considered in fixing the amount of damages, and consequently sub-contracts of which the seller had no notice must be disregarded whether for the purpose of increasing or diminishing the damages[5]. Again, though the general rule is that the date at which the difference between the two values is to be fixed is the date of delivery, circumstances may exist which render it necessary to take a later date. Thus in *Loder* v. *Kekule*, *supra*, the buyer had contracted for "Russian prime Ukraine Y. C." tallow, and had paid in advance for it. The tallow was found on delivery to be of inferior quality, so that the amount of the damages ought to have been fixed with reference to the market price on that day. The buyer, however, did not resell the tallow till some time afterwards, when the market price had fallen, but the court being of opinion that the delay was due to the conduct of the seller, and the jury having found that the buyer had resold the tallow as soon as he reasonably could, the buyer recovered as damages the difference between the market value of tallow according to the contract at the date of the breach and the price subsequently obtained on the resale of the tallow delivered.

In *Ashworth* v. *Wells*[6] an orchid was sold warranted as a white orchid for £20 : but when it flowered two years later it turned out to

1 Bostock v. Nicholson (1904) 1 K.B. 725, at p. 736; Randall v. Newson (1877) 2 Q.B.D. 102 C.A.; Wilson v. Dunville (1879) 6 L.R.Ir. 210; Davis v. Miller (1894) 10 L.T.R. 286; Holden v. Bostock (1902) 50 W.R. 323, C.A.; Frost v. Aylesbury Dairy Co. (1905) 1 K.B. 608, C.A.; Jackson v. Watson (1909) 2 K.B. 193 C.A.; British Westinghouse Co. v. Underground Electric Co. (1912) A.C. 673 H.L.; Geddling v. Marsh (1920) 1 K B. 668; Slater v. Hoyle (1920) 2 K. B. 11 C.A.; Taylor v. Bank of Athens (1922) 27 Com Cas. 142; Pinnock v. Lewis (1923) 1 K.B. 690, at p. 697.

2 See Ashworth v. Wells (1898) 78 L.T 136.

3 (1859) 7 C.B. (N.S.) 145; 29 L.J.C.P. 143; 121 R R. 424.

4 (1868), L.R. 3 Q.B. 197; 37 L J.Q.B. 89.

5 Loder v. Kekule (1857) 3 C.B.N.S. 128, 139—140. 111 R.R. 575; Slater v. Hoyle and Smith (1920) 2 K.B. 11 C.A.

6 (1898) 78 L.T 136, C.A.

be a common purple orchid of no value. A white orchid was worth at least £50, but before it flowered buyers would not be willing to give more than £20 for it. It was held by the Court of Appeal that in these circumstances the date to be considered was the date at which it flowered, and not the date at which it was delivered, and the damages were £50, not £20

The value of goods as warranted is their intrinsic value, and not any special value which they may have to the buyer. To apply the latter standard would enable the buyer to recover special damages without having brought to the seller's knowledge the particular circumstances which may give to the goods their special value. But special circumstances, such as a sub-sale known to the seller, and the absence of a market, may give the goods an exceptional value.[1] Thus in *Hamilton* v. *Magill*[2] where the plaintiffs bought from the defendant No. 1 iron c f. i. to Philadelphia at £65s a ton, and resold it at £6. 10s., and the iron delivered was No. 2 iron, and was rejected by the sub-buyer, and then sold by the plaintiffs for £975, it was held that the plaintiffs in an action for breach of warranty, could recover the difference between £975 and the sub-sale price, and not only the difference between £975 and the sub-sale price. as the seller had knowledge that the iron was bought to enable the plaintiffs to accept the sub-buyer's offer.

Other warranties.

In the case of other warranties, the general rule governing the measure of damages for the breach is laid down in sub-section (2) of section 53 of the English Act, and is the same as in section 73 of the Indian Contract Act. The rule is that the measureof damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

In *Mullett* v. *Mason*,[3] the plaintiff. a farmer, placed with other cattle a cow bought from the defendant, which was fraudulently warranted to be sound although known by the seller to be affected with an infectious disease. He was held entitled to recover as damages the value of such of his own cattle as had died from the disease communicated to them by the infected animal, as the plaintiff had a right to rely upon the representation that the cow was sound, and the direct result of such reliance would be that he would place her with other cows; and the court refused to reduce the damages to the value of the cow bought. The case *Hill* v. *Balls*[4] was distinguished on the ground that in this latter case there had been simply the sale of a horse which happened to be glandered, without any misrepresentation or warranty to induce the buyer to put the horse in the same stable with others.

1 See Benjamin on Sale, 7th Edn., p. 1044.
2 (1883), 12 L.R.Ir. 186, cf. Slater v. Hoyle, supra, in which a sub-contract of which the seller had no notice was disregarded.
3 L.R. 1 C.P. 559; 35 L.J.C.P. 299. See, for a similar decision where the facts were similar, except that the warranty was not fraudulent, Smith v. Green (1875), L.R.I.C.P. 95; 45 L.J C P. 28; It makes no difference whether the warranty is false to the knowledge of seller or not.
4 (1857), 2 H. & N. 299; 27 L. J. Ex. 45; 115 R.R. 547.

In *Taylor* v. *Bank of Athens*[1] there was a sale of beans to be shipped in August, which were accepted and paid for. It subsequently transpired that the beans were shipped in September. There was no difference in value between beans shipped in August and beans shipped in September. *Held*, that only nominal damages were recoverable.

In *Van den Hurk* v. *Martens*[2] it was held that as goods sold for export would not be opened until contents are actually required for use, the damage is to be assessed according to the prices ruling on the date of rejection by sub-buyers and not on the date of delivery to the buyer.

Goods not answering to the description.

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description[3]. When the buyer is treating a breach of condition in this case as a breach of warranty, the damages for such breach of warranty are different from the damages which result from a mere breach of warranty of quality, and are governed by the general rule laid down in section 53 (2) of the English Act corresponding to section 73 of the Indian Contract Act, and not by the more limited rule laid down in section 53 (3) of that Act,

In *Bostock* v. *Nicholson*[4] A sold sulphuric acid to B as commercially free from arsenic B used it for making glucose, which he sold to brewers and the presons who drank the beer made by the brewers were poisoned. A did not know the purpose for which the acid was required. In an action for breach of warranty, *held*, B can recover the price of the acid and the value of the beer spoiled, but not the damages he has had to pay to the brewers or damages for injury to the good- will of his. In this case the purpose for which the buyer had ordered the goods was not expressly or by implication communicated to the seller. The result might have been different if they had actually sold the acid, instead of glucose made from it to the brewers, or had made it known to the defendants that they rquired the acid for the purpose of making glucose for sale to brewers, for in the latter case they might have established a breach of warranty within section 16 (1).

In *Wilson* v. *Dunville*[5], the plaintiff, a dairy farmer, had bought from the defendants. distillers, a quantity of grains which the defendants warranted to be "distillers' grains, " and which were ordinarily used for feeding cattle, though the sale to the plaintiff was not expressly made for that purpose. The grains contained an admixture of lead, and several of the plaintiff's cattle were poisoned and died. The warranty was not fraudulent. It was found by the jury that the grains sold did not reasonably correspond with the

1 (1922), 91 L.J K B. 776.
2 (1920) 1 K B 850. See also Pinnock Bros. v. Lewis & Peat (1927) 1 K.B. 690.
3 Section 15 ante, p. 212.
4 (1904) 1 K B. 725, C.A.; For a case where damages for a loss of goodwill were held recoverable see Cointat Myham & Son (1918) 2 K.B. 220. On Appeal, however, a new trial was ordered inorder that the question of custom excluding any implied condition might be left to the jury. See 110 L.T..749.
5 6 L.R.Ir. 210; S.C. 4 L.R.Ir. 249.

description "distillers grains." The defendants was held liable for the poisoning of the plaintiff's cattle. It was observed:

> 'For the purpose of rendering a defendant responsible for damages which, in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties............If those consequences result solely from the act in question and unusual state of things, they are the ordinary and usual consequences of that act, and the defendant is liable."

In *Randall* v. *Raper*,[1] the plaintiffs had bought barley from the defendant as chevalier seed barley, and in the usual way of their trade as corn factors they believing it to be chevalier seed barley, resold it with a warranty that it was such. The sub-buyers sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy. *Held*, that the buyer was entitled to recover those damages from the seller, and it is not material whether the seller had notice that the buyer intended to resell or not.

Breach of warranty of fitness.

In the case of a breach of warranty that the goods should be fit for a particular purpose, the rule for damages is the same as in the case of a breach of description, *i. e.* the damages should be such as naturally flow from the breach and may be recovered in respect of consequential loss sustained though the failure of such purpose provided that such losses are not too remote.

In *Randall* v. *Newson*[2] the plaintiff bought of the defendant, a coach-builder, a pole for his carriage. The pole broke, and the horses became frightened, and were injured to the extent of £ 130. The price of the new pole was £ 3. It was held by the Court of Appeal that the plaintiff might recover not only the value of the pole, but also damages for the injury to the horses if the jury should find that such injury was the natural consequence of the defect in the pole.

In *Jackson* v. *Watson*[3] the plaintiff, whose wife had died from eating tinned salmon supplied by the defendants, was held entitled to recover, as damages for the breach of the warranty that the salmon should be fit for human food, the expenses of medical attendance on the wife, her funeral expenses and a sum to compensate him for the loss of his wife's services.

In *Holden Ltd.* v. *Bostock Ltd.*[4] the plaintiff a brewer was allowed as damages the market value of the beer which had to be destroyed as tha sugar used in its preparation contained poisonous matter and which was supplied by the defendant in breach of a warranty that the sugar did not contain any poisonous matter. In *Smith* v. *Johnson*[5] there was breach of warranty in supplying

1 E.B. & E. 84; 27 L.J.Q.B. 266; 113 R.R. 554; See also Wallis v. Pratt (1911) A.C. 394.
2 (1877) 2 Q.B.D. 102; 46 L.J.Q.B. 259 (C.A.); Davis v. Miller (1894) 10 T.L.R 286.
3 (1909) 2 K.B. 193; 78 L.J.K.B. 587 (C.A.). See also Frost v. Aylesbury Dairy Co. (1905) 1 K.B 608; 74 L. J K. B. 386 (C.A.) (typhoid germs in milk).
4 (1903) 18 T.L.R. 317.
5 (1899) 15 T.L.R. 179.

mortar for building operations. The building was condemned by the County Council on the ground that the mortar was bad. The plaintiff was held entitled to recover costs of pulling down, rebuilding and for loss of ground rent. In *Smith* v. *Green*[1] a cow was sold in breach of a warranty that it was free from disease, but it had foot and mouth disease and infected other cows belonging to the purchaser and they all died. The seller was held liable for the whole loss. In *Scott* v. *Foley*[2] there was breach of warranty as to the fitness of the ship. The Charterers were held entitled to recover damages and costs for which they were made liable to a stevedore for breach of the warranty. In *Vogan* v. *Oulton*[3] it was held that a hirer of sacks who had to pay damage caused to a labourer owing to sacks giving away could recover the same from the person from whom they were hired.

Buyer and sub-buyer

Where the buyer, having bought goods as fit for a particular purpose, re-sells them with the same warranty, and owing to their not being fit for that purpose has to pay damages to his buyer, what is the position regarding payment of damages?

In *Hammond* v. *Bussey*[4] the contract was for the sale of steam coal fit to be used in steamers, *and the seller knew* that the buyer required it for the purpose of re-selling it as such to steamers at Dover but did not know of any particular sub-contract. No sub-contract had in fact been entered into at the time. The coal was not fit for that purpose and the buyer had to pay damages to his sub-buyer in consequence. It was held by the Court of Appeal that the buyer was entitled to recover the costs incurred by him to defend the suit for damages brought by the sub-buyer, as well as the damages from the defendant. The quality of the coal could only be detected by use, and the plaintiffs had only the sub-purchaser's word as to its defects; they had, moreover, given notice to the defendant of the action. The plaintiffs, therefore, had acted reasonably in defending the action, and it might, in the circumstances of the case, reasonably be supposed to be in the contemplation of the parties at the time of making the contract as a probable consequence of the breach of it.

Subsequent cases have all been based upon *Hammond* v. *Bussey* and the finding that the sub-sale was to be taken as in the contemplation of the parties exists in all cases where the buyer has been held entitled to recover damages which he has become liable to pay to sub-purchasers. There, however, appears to be no authority in which it is expressly laid down that in such cases, as contrasted with cases in which the seller has failed to deliver, it is essential that a re-sale by the buyer should have been contemplated by the parties, in order to entitle the buyer to recover damages to which he has become liable for the breach of his contract with the sub-buyer. It may be argued that the damages to the buyer flow as naturally from the breach, if he sells the goods believing them to be fit for the particular purpose for which, to the knowledge of the seller, he bought them, as when he makes use of them himself

1 (1875) L.R.I.C.P. 92.
2 (1899) 16 T.L.R. 55.
3 81 L.T. 435.
4 (1887) 20 Q.B.D. 79. C.A., already quoted.

in that belief Even when an article, such as a horse, is sold with an express warranty of soundness or the like, and it is resold by the buyer with a similar warranty and in consequence of the breach of it he is sued by the sub-buyer, he may recover the damages and costs from the seller, provided that he has acted reasonably in defending the action ; and it is not suggested that in such a case it must have been within the contemplation of the parties that the buyer should resell[1].

It, therefore, seems clear that the buyer in such cases is entitled to recover as part of his damages not only the costs which he has been compelled to pay to the successful plaintiff but also his own costs as between solicitor and client incurred by him in defending the action[2], and where, as is often the case, there is a string of contracts, the damages payable by the seller may be very heavy[3].

Buyer must act reasonably.

A buyer complaining of a breach of warranty must, as in other cases, act reasonably by way of mitigating the effects of the breach. It means the same thing whether we say that a plaintiff must minimize his damages or we say that he can recover no more than he would have suffered if he had acted reasonably, as any further damages do not reasonably flow from the defendant's breach.[4] Thus, where a plaintiff has no defence, he is not entitled to recover the costs of defending an action ; and, similarly, he resells at his own risk if by the exercise of a reasonable care he could have ascertained before reselling that the warranty was broken[5].

It has been further held under the English law that to enable a buyer, who has resold or otherwise dealt with the goods, to recover consequential damages for a breach of warranty over and above the ordinary measure of the difference in values, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he resells or deals with them, for otherwise the damages claimed do not "directly and naturally" result from the seller's breach of warranty but are due to the buyer's own negligence[6]. The circumstance that the defect in the goods is not readily discoverable is of course very material[7].

Lewis v. Peake (1816) 7 Taunt. 153, 17 R.R. 475. Indian Contract Act, section 73, illustration (m).
Following Agius v. Great Western Colliery Company (1899) 1 Q.B. 413, C.A.: recovery of costs of defending suits brought by sub-purchaser ; Bennett v. Kreeger (1925) 41 L R. 609: purchaser entitled to damages and costs paid to customer and his own costs as between attorney and client. See also Pollock and Mulla, Indian Sale of Goods Act, pp. 313 to 315.
Kasler & Cohen v. Slavonski, (1928) 1 K.B. 78: where the first purchaser was held entitled to damages obtained by the last purchaser in the chain and costs incurred by successive sellers in defending; Dexters, Ltd. v. Hill Crest Oil Co. (1926) 1 K B. 348 ; Chain contracts with different descriptions of the goods. See also British Oil & Cake Co. v. Burstall (1923) 39 T.L.R. 406.
Payzu Ltd. v. Saunders (1919) 2 K. B. 581, 589, Scrutton, L. J.
See Wrightup v. Chamberlain (1839) 7 Scott 598, 50 R. R. 855.
Wrightop v. Chamberlain, supra ; per Parke B. in Walker v. Hatton (1842), 10 M. & W. 255 ; 11 L. J. Ex. 361 ; 62 R.R. 600 ; Hammond v. Bussey, supra ; See Benjamin on Sale, 7th Edn., page 1052.
Mowbray v. Merryweather, (1895) 2 Q. B. 640, where the defect in a chain sold was capable of discovery, yet could only have been discovered by a minute examination.

But a buyer is not bound to take any action which a reasonable and prudent man would not take in the ordinary course of business; yet any action which in fact he does, and reasonably might, take connected with the transaction, and which lessens his loss, whether he is bound to take it or not, will be relevant on the question of damages[1]. Thus, in *British Westinghouse Co.* v. *Underground Railways*[2], the buyers of electric machines, which failed in respect of powers and economy of coal consumption, ultimately replaced them by Parsons machines of greater capacity and less steam consumption, the substituted machines being so superior to the contract machines that, according to an arbitrator's finding, it would have paid the buyers to instal them even if the contract machines had been according to contract. In an action for breach of warranty the buyers contended that they were entitled to recover the cost of the installation of the Parsons machines as minimising their loss in the future; the sellers contended that the commercial life of the contract machines had ended; accordingly that no damages for the future after the installation of the Parsons machines (including the cost of the installation) were recoverable. *Held*, by the House of Lords, that the installation of the Parsons machines was not *res inter alios acta*; that the advantage to the buyers by the use of these machines should be brought into account in estimating the damages; and that the sellers were right, and the buyers wrong, in their respective contentions. Apart from the breach of contract, lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.

Similarly, a buyer is not bound to minimise the damages by doing things which, though in strict law he might be entitled to do them, would be seriously detrimental to his business reputation. In *Finlay* v. *Kwik*[3] the breach of contract consisted in tendering a bill of lading dated incorrectly. The buyer, unaware of this fact at the time of tender, accepted the shipment and entered into sub-contracts for sale of part of the goods, the sub-contracts containing a clause that "the bill or bills of lading shall be conclusive evidence of the date of shipment." The sub-buyers refused to take delivery on the ground that the shipment had not been made at the contract date. It was held that the buyer was not bound to enforce, for the purpose of minimising the damages, the contracts which he had entered into with the sub-buyers, as to do so, after he knew that the shipment date was incorrect, might seriously injure his commercial reputation.

Other conditions.

In case of breaches of other conditions also which can be treated as breaches of warranty, for instance, warranty of title, the buyer seems to be entitled to recover from the seller the damages and costs to which he may have become liable in an action by the sub-buyer. Such a case may arise where a buyer purchases goods from a person who has no right to sell it and resells to a third person, from whom the true owner recovers it or its value. Similarly, if the time of shipment is the essence of the contract and the goods are shipped

1 See Benjamin on Sale, 7th Edn., p. 1050.
2 (1912) A.C. 673; 81 L.J.K.B. 1132.
3 (1929) 1 K. B. 400, C. A.; 98 L. J. K. B. 251.

late, in such cases, if the buyer accepts the goods, he is entitled to recover the difference between the value which the goods would have had if they had been shipped in time, and the value which they actually have. If there is no difference, the buyer cannot recover more than nominal damages[1].

In *Molling* v. *Dean*[2] the plaintiffs, colour printers in Germany, supplied the defendant with a large number of toy books which, as they knew, the defendant had resold at a profit to a New York publisher for sale in America. The plaintiffs packed the books specially for carriage to America, and the defendant, without opening the cases, sent them on. The American sub-buyer rejected the goods as being badly printed, and reshipped them to the defendant in London. *Held*; that as America was the place of inspection, the defendant was entitled to reject the books after their rejection by the sub-buyer and was entitled to recover the expense of sending the books to America, and of their return, and the customs duties at New York, and also his loss of profit on the sub-sale.

Buyer's expenses where goods rejected by distant sub-buyer

Loss of business or injury to business reputation.

Damages or injury to business reputation caused by the breach are too remote and cannot ordinarily be recovered. In *Watson* v. *Gray*[3] damages for general loss of business have been held too remote. In *Bostock & Co.* v. *Nicholson*[4] there was sale of sulphuric acid with arsenic which was used in the preparation of beer which caused illness to those who drank and as a result the buyer could not carry on any business. It was held that damages to the good will of the plaintiff's business could not be recovered. In an American case reported as *Swain* v. *Schieffelin*[5] damage for loss of custom was allowed. In that case the manufacturers of ice-cream used as a colouring matter a liquid called "carlet red" which to the knowledge of the manufacturer contained arsenic; and many of the buyer's customers became ill.

Sub-section (2)

Before 1873 (the years of passing of the Judicature Acts) it was held that when a breach of warranty was pleaded as a defence to an action for the price, a diminution or exinction of the price was limited to the difference between the actual value of the goods and their value as warranted and that a cross-action only would lie in respect of special or consequential damages satisfied by the diminution or extinction of the price[6]. But now that defence and counterclaim can be pleaded together, this point is seldom, if ever, of importance. The buyer if sued by the seller, is not bound to set up the breach of warranry as a defence in the seller's action, but may bring a cross-action. In the result the buyer may divide his cause of action, or may keep it entire and sue for his whole damage[7].

1 Finlay v. Kwik, supra ; Taylor v. Bank of Athens (1922) 91 L. J. K. B. 776.
2 (1901), 18 T. L. R. 217; Proops v. Chaplin & Co. (1920) 37 T. L. R. 112 : buyer was entitled to recover costs of defending a prosecution for selling whisky of wrong strength at the price.
3 16 T. L. 308.
4 (1904) 1 K. B. 725; See also Doe v. Bowater (1916) W. N. 185.
5 (1892) 134 N. Y. 471.
6 Mondel v. Steel (1841), 8 M. & W. 858; Rigge v. Burbridge (1946). 15 M. & W. 598.
7 See Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 202, f.n. (b) and authorities cited therein.

Repudiation of contract before due date.

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other party my either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

This section is new and has no corresponding provision in the English Act. The principle embodied in it is included in sections 39 ond 120 of the Indian Contract Act.

The remedies on an anticipatory breach have been recognised for a long time in England as well as in this country[1], though the expression "anticipatory breach "is not very appropriate. As Lord Wrenbury pointed out in *Bradley* v. *Newson*[2]:

"There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arise he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future."

Repudiation of contract—anticipatory breach.

A contract is repudiated when a party shows by his conduct an intention not to be bound by the contract, or when he refuses to perform it[3]. It is not necessary that the party should say in so many words that he will repudiate the contract or intends to do so[4]. If in fact he is repudiating the contract, he is doing so, although he may be contending that he is performing the contract, and may be expressing an intention to perform what is left of the contract[5].

The general principle is laid down in section 39 of the Indian Contract Act. The present section is a particular case of a much wider principle which gives an immediate right of action in damages to one party to a contract if and when the othere party, before the time of performance, clearly shows his intention not to be bound by and to repudiate his contract. *Hochster* v. *De la Tour*[6] was the first case in England in which it was decided that a prospective refusal amounted to an *immediate* breach, of which the promisee could at once take advantage if he chose. The whole law on this subject was re-examined and conclusively settled in *Frost* v. *Knight*[7] in which Cockburn C. J. observed :

1. See Leigh v. Paterson (1898) 129 R.R. 483; Frost v. Knight (1870) L.R. 7 Exch. 111; Mansukhdas v. Rangachi, 1 Mad. H.C.R. 162; Steel Bros. v. Dayal Khushal, I.L.R. 47 Bom. 924.
2. (1919) A.C. 16 at p. 58.
3. Freeth v. Burr (1874) L.R. 9 C.P. 208; Mersey Steel Co. v. Naylor (1884) 9 App. Cas. 434; Sooltan v. Schiller (1879) 4 Cal. 252, 255; see also Rash Behary v. Nrittya Gopal (1906) 33 Cal. 477, at p. 481.
4. See per Sir George Jessel in Mersey Steel Co. v. Naylor, supra.
5. Millar's Karri Co. v. Weddel & Co. (1909) 14 Com. Cas. 25, at pp. 30, 31.
6. (1853) 2 E. & B 678, 95 R.R. 747.
7. L.R. 5 Ex. 322; 7 Ex. 111; 41 L.J. Ex. 78.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in the case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In *Johnstone* v. *Milling*[1] the Court of Appeal expressed a strong opinion to the effect that the doctrine of *Hochster* v. *Dela Tour* does not extend to cases where the party suing would have no right to throw up the *whole* contract upon a breach by the other party at the date appointed for performance. Just as in the case of a contract, which contains many terms, actual failure to perform one does not neccessarily give the other party a right to treat it as repudiated, but only a right to sue for damages, so an anticipatory refusal to perform one term of a contract does not necessarily entitle the other party to rescind. To enable the party not in fault to repudiate the contract, the anticipatory breach by the other party must be one "going to the whole consideration[2]." In other words, the right of repudiation for an anticipatory breach by the promisor can stand on higher ground than a breach at the time of performance, and the term in question must be one which goes to the root of the contract, that is, one which, if broken renders the performance of the rest of the contract substantially different from what the party, not in fault, contracted for[3] where the contract is in writing. the question whether the term is such as to go to the root of the contract is one for the court[4].

The other party must make his election, and either treat the contract as rescinded for all purposes, or keep it alive for all purposes He cannot, therefore, bring an action for damages for the anticipatory refusal to perform one term of the contract. and at the same time treat the contract as in existence in other respects[5].

In *Nagisetty* v. *Venkatasubbayya* also it has been similarly held that where there is a repudiation by the promisor by the anticipatory refusal to perform the contract before the time for performance has arrived, two courses are open to the promisee, namely. either to treat the contracts as subsisting or to treat them rescinded, and if he elects to treat the repudiation as inoperative and treat the contracts as still in force, in such a case the promisee keeps the contract alive for the benefit of the other party as well as his own; in other words, he keeps the contract alive for all purposes. But if the promisee fails to fulfil a condition precedent which is binding on him, the promisor will be discharged.

1 (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162 (C.A.); Mansukhdas v. Rangayyachetti (1868) 1 Mad. H.C. 162; Hochester v. De La Tour (1853) 2 E. & B. 678; Synge v. Synge (1894) 1 Q.B. 466.

2 Michael v. Hart & Co. (1902) 1 K. B. 489, at 490; 71 L J.K.B. 265 (C.A.)

3 See Johnstone v. Milling, supra.

4 George D Emery Co. v. Wells (1906) A.C. 515, P.C.

5 Johnstone v. Milling, supra.

When the contract is repudiated before the time of performance arrives the other party accepting the repudiation is under an obligation to take all reasonable steps to mitigate the damage for non-performance "In assessing the damage for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means, of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been diminished.[1]" Where the purchaser repudiates before delivery when the market is steadily falling, the seller is under an obligation to resell within a reasonable time to minimise the damage. When the goods are intended by the buyer for a particular sub-contract, the buyer is under an obligation to minimise the loss by purchasing similar goods in open market to fulfil the contract[2].

When delivery is withheld at the request of buyer the buyer will have to pay the additional loss caused thereby.[3] In *British Automatic Co.* v. *Haynes*[4] there was refusal to accept two machines hired at a weekly rent for 3 years. Four week's rent was allowed as damages as the period was considered sufficient to let out the machines on hire again and it was immaterial that the owner had more than two machines in stock.

If the party not in default accepts the other's repudiation and rescinds, he is, so far as anything remains to be done by him at the date of the rescission, discharged from all performance or offer to perform it, and he may therefore recover damages on the basis that he was ready and willing to perform his contract and cannot be sued by the party in default for non-performance[5]. Of course, the repudiation which so absolves a party from performance of conditions precedent must have been made before the due date for the performance of the contract by him[6].

In *Cort* v. *Ambergate Co.*[7] there was sale of goods to be manufactured and delivered. The buyer accepted part and gave notice to the seller not to manufacture any more. The seller without manufacturing or tendering the rest was held to be entitled to sue for breach of contract and was entitled to be placed in the same position as if the whole contract was performed. In *Mackertich* v. *Nabo Coomar*[8] the purchaser did not rescind the contract on the seller's repudiation. Held, damage to be assessed on the basis of the difference between the contract price and the market price on the last date of delivery.

1 Per Cockburn C.J. in Frost v. Knight (1877) L.R. 7 Ex at p. 112. See also Roper v. Johnson. (1873) L. R. 8 C. P. 167.

2 Roth v. Taysen (1896) 1 Com. cas. 306. See also Nickoll v. Ashton (1900) 2 Q. B. 298, 305; Melachrino v. Nicholl, (1920) 1 K.B. 693.

3 Ogle v. Earl Vane (1868) L.R. 2 Q.B. 275, 284; Hickman v. Haynes (1779) L.R. 10 C.P. 598; Bank of Morvi v. Baerlein Bros. (1924) 48 Bom. 374; Krishna Jute Mills v. Innes (1911) 21 Mad. L. J. 182; Muthaya v. Lekku (1912) 37 Mad. 412.

4 (1921) 1 K.B. 377.

5 Cort v. Ambergate Rly. Co. (1851) 17 Q B. 127, 85 R.R. 369; Chunna Mal-Ram Nath v. Mool Chand Ram, A.I.R. 1928 P.C. 99=9 Lah. 510=108 I. C. 678 (disapproving Abaji Sitaram v. Trimbak Municipality (1903) 28 Bom. 66); Jhandoo Mal-Jagan Nath v. Phul Chand Fateh Chand. A.I.R. 1925 Lah. 217=5 Lah. 497=85 I.C. 118; See also notes under section 38 (2).

6 Steel Brothers Ltd. v. Dayal Khatao & Co. (1923) 47 Bom. 924=A. I. R. 1924 Bom. 247=87 I. C. 67.

7 (1851) 17 Q. B. 127.

8 (1903) 30 Cal. 477. See also Cooverji v. Rajendra (1909) 36 Cal. 617.

No obligation to accept the repudiation.

The express words of the section make it clear that where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. Under the English law there appears to have been some confusion on this point.[1]

Measure of damages.

Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed on the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation[2]. Thus the measure of damages is not affected by the date of the defaulting party's repudiation, and is fixed as in other cases already discussed[3], by the difference between the contract price of the goods and the market price on the day,[4] or, if delivery was to be made by instalments on the several days[5], when they ought to have been accepted, as the case may be.

In *Roper* v. *Johnson*[6] it has been held that 'even if the defendant absolutely repudiates his contract at any period previous to the final date specified in the contract, yet in considering the question of damages, they will be estimated with reference to the times at which the contract ought to have been performed.' But in *Ram Gopal* v. *Dhanji Jadhavji*[7], a case of an anticipatory breach of a contract to gin cotton, Lord Sumner said:

'The contract was repudiated as soon as it was made and the intended operation being thus baulked, the plaintiff was entitled to measure the damages *they then stood* and could not be required by the defendants to buy the cotton which they had announced in advance they would not give for him.

This was, however, an anticipatory breach of contract for work and labour and not of sale of goods.

"The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages[8] and the damages must be estimated by the difference between the contract price and the market price at the day or days

1. See Nickoll & Knight v. Ashton Eldridge & Co. (1900) 2 Q. B. at p. 805 and Tredegar Iron & Coal Co. v. Hawthorn Bros & Co. (1902) 18 T. L. R. 716, C. A.; Michael v. Hart & Co. (1902) 1 K. B. 482, C. A. See also notes under section 56.
2. Maung Po Kyaw v. Saw Tago, A. I. R. 1933 Rang. 25=150 I. C. 760.
3. See notes under section 56 and the provisions of sub-section (3) of sections 50 and 51 of the English Act referred to therein.
4. Boorman v. Nash (1829) 9 B. & C. 145, 32 R. R. 607; Phillpotts v. Evans (1839) 5 M. & W. 475, 52 R. R. 802; Melachrino v. Nickoll & Knight (1920) 1 K. B. 693; Mackertich v. Noboo Coomar (1903), 30 Cal. 477; Mahendra Chandra v. Aswini Kumar, (1921) 48 Cal. 427=60 I. C. 837; Bilasiram v. Gubbay (1915) 43 Cal. 305=33 I.C. 23; Krishna Jute Mills v. Innes (1911) 21 Mad. L. J. 182= 9 L. C. 104; Cooverji v. Rajendra (1909) 36 Cal. 617=2 I. C. 831.
5. Leigh v. Paterson (1818) 8 Taunt. 540. 20 R. R. 552.
6. (1873) L. R. 8 C. P. 160; Brown v. Muller (1872) L. R. 7 Ex. 319.
7. (1928) 55 I. A. 299=55 Cal. 1048.
8. Roper v. Johnson, supra; Manindra Chandra Nandi v. Aswini Kumar Acharjya, supra; Bilasiram v. Gubbay, supra.

appointed for performance and not at the time of breach." It is, however, a ground for mitigation of damages if the defendant can show (and the onus of establishing this is upon him) that the plaintiff might have diminished his loss by going into the market on, or after, the day of rescission and making a forward contract at the then market price[1], or by taking other reasonable opportunities to minimize the damages[2].

In *Sheo Narain Gopi Ram* v. *New Sevan Sugar & gur Refining Co. Ltd*[3] plaintifl I, the New Sevan Sugar and Gur Refining Co. Ltd., through their agents, Messrs. Bird & Co., and the defendants' firm styled 'Sheo Naraim Gopi Ram' entered into a contract on 22nd June 1935, Underthis contract, the defendants purchased 900 bags of sugar. Under the terms of the contract, the defendants agreed to take delivery of the goods purchased by them in three instalments in the months of July, August and September 1933, There was a breach and therefore the plaintiffs instituted a suit to recover damages. The trial court came to the conclusion that the defendants had committed a breach of the contract and that they were liable to pay damages to the plaintiffs. The learned Judge, however, was of the opinion that the plaintiff did not exercise their right of re-sale within a reasonale time. In his opinion, the prices were going down and the plaintiffs should have sold the goods much more quickly than they did, For this reason he came to the conclusion that they were not entitled to the full amount of damages claimed by them.

On appeal by the plaintiffs the District Judge agreed with the view taken by the trial court that a breach had been committed by the defendants. He was further of opinion that the plaintiffs were entitled to a decree for the full amount of damages claimed by them. He therefore decreed the suit of the plaintiffs in full. On further appeal it was held by the High Court:

(1) that the finding of the District Judge that it was the defendants who committed a breach of contract, is a pure question of fact which cannot be disturbed in second appeal.

(2) The defendants committed a breach when they did not instruct the plaintiffs to send them 300 bags on 31st July. They were again in breach when they took no steps to give instructions in respect of the second instalment in the month of August.

(3) Although under section 60 the seller is bound on a breach of contract by the buyer to treat the contract of sale as cancelled and to exercise his right of re-sale within a reasonable time of the breach, yet where it appears that the delay on the part of the seller was mainly due to the unreasonable and unfair attitude adopted by the buyer with a view to gain time, the seller cannot be said to have acted with undue delay in not exercising his right of re-sale immediately.

Goods to be delivered by instalments but no time fixed for delivery—measure of damages.

1 Roper v. Johnson, supra; Krishna Jute Mills Co. v. Innes (1911) 21 Mad. L. J. 182; Melachrino v. Nickoll, supra; Millett v. Van Heek & Co. (1921) 2 K. B. 369, C. A.

2 Payzu, Ltd. v. Saunders (1919) 2 K. B. 581, C. A.

3 A. I. R. 1938 All. 272.

What is the measure of damages when a contract is one for delivery by instalments and there is no time fixed for the delivery, and one party refused to proceed with the contract? It has already been observed that in India a contract to be performed within a reasonable time must be treated as a contract which does not fix the time for performance. As a result of it, when there is a refusal to proceed with it, the date of such refusal must be treated as the date on which the contract is broken, and therefore as the date on which the damages are to be assessed.[1] This rule, however, does not seem applicable strictly to cases where there is an anticipatory refusal to perform a contract to deliver by instalments within a reasonable time. In *Millett* v. *Van Heek & Co.* the contract was for the sale of cotton to be delivered by instalments after the removal of an embargo by Government, the date for which was uncertain. Before removal of the embargo the sellers repudiated and the buyers accepted the repudiation before the removal of the embargo. The buyer claimed that the damages should be fixed by reference to the market price at the date of rescission, but this contention was not accepted by the court and it was observed:

> "It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. This is beyond controversy. ...,... But it is said that, if no times have been expressed in the contract, and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time even though the time might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction, as to vary what was the rule of law at the time when it was passed . namely, that the damages are to be fixed in reference to the time for performance of the contract subject to question of mitigation."

It appears that where the contract is for sale of goods to be delivered by instalments *as required*, or on like terms, the date of rescission must be taken to be the date at which to assess the damages. There seems to be no direct authority on the point but the proposition may be deduced from the analogy of such cases as relate to anticipatory breach of contract for work and labour and contracts other than contracts of sale, as noticed in *Ramgopal* v. *Dhanji Jadhavji Bhatia*[2].

Treating the contract as subsisting—effects.

The section allows the party not in default to elect to treat the contract subsisting even when the second party to it repudiates it before the date of delivery. In that case, as noticed in *Frost* v. *Knight*, already quoted, he keeps the contract alive for all purposes. Consequently if, when the time of performance arrives, he himself is unable to perform or does not perform his contract, the position will be the same as it would have been if there had been no anticipatory repudiation by the other party and the latter will be discharged and

1 See section 56 and notes thereunder. 2 A. I. R. 1928 (P. C.) 200 cited above.

may himself sue for damages[1]. If, therefore, the seller, for instance, after refusing to accept the buyer's anticipatory repudiation, when the time for performance arrives, tenders goods which are not of the contract description, the buyer may lawfully reject the goods and the seller will be without remedy. The buyer may also accept the goods tendered and treat the breach of condition as a breach of warranty and recover damages accordingly. The same will be the position if under a.c.i.f. contract the seller tenders documents which the buyer is not bound to accept.

The case of *Braithwaite* v. *Foreign Hardwood and Co.*[2] requires special notice. In that case there was a contract for rosewood deliverable by instalments during the year, and to be paid for by cash against bill of lading. Before the arrival of the first instalment the buyers repudiated the contract. On its arrival the bill of lading was tendered, and the buyers repeated their refusal, and the seller resold. The second instalment was similarly tendered and refused and resold. The buyers subsequently discovered that the first instalment was somewhat inferior to contract quality. In an action for non-acceptance the buyers contended that the seller had elected to keep to the contract, and not to accept the buyer's repudiation; accordingly he had to show he was ready and willing to deliver goods according to contract, which he could not do with regard to the first instalment, so that damages could be claimed only for non-acceptance of the second instalment. The Court of Appeal *held* that, assuming the seller had elected to keep the contract alive, he was excused from performing conditions precedent which the buyers waived, and that the buyer's subsequent knowledge did not help them; accordingly the damages should be assessed on the basis that the first instalment was according to contract, and the seller could recover the difference in value with regard to both instalments.

This case has been stated by Lord Sumner to be "not quite easy to understand[3]," and that in effect it was said that, even after the seller had, as it was called, kept the contract alive and proposed to tender the cargo, he had been told a second time, in terms of the first refusal, you need not tender any cargo to us at all; *a fortiori* you need not tender a cargo which is in conformity with the contract. You have a cargo of some sort, which we refuse to take; and you may prove your damages for that, if we fail to prove you wrong."

Greer J. in *Taylor* v. *Oakes*[4] expressed the opinion, which was approved in the Court of Appeal, that the decision merely meant that a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that, if he had not refused, the goods when delivered, would not have been according to the contract." "It does not decide that if wrong goods or wrong documents of title are actually presented for acceptance to the buyer and refused by him for an

1 Cf. Croockewit v. Fletcher (1857) 1 H. & N. 893, 108 R. R. 882; Phul Chand Fateh Chand v. Jugul Kishore-Gulab Singh A. I. R. 1927 Lah. 693=(1927) 8 Lah. 501=106 I. C. 10; Burn & Co. v. Morvi State A. I. R. 1925 P. C. 188=90 I. C. 52=30 Cal. W. N. 145; See Pollock and Mulla, Sale of Goods Act, p. 323

2 (1905) 2 K. B. 543, C. A. cf. Rustamji v. Haji Hussain (1920) 22 Bom. L. R. 1165, 59 I. C. 515; Steel Bros. v. Dayal (1923) 47 Bom. 924.

3 British & Beningtons Ltd. v. N. W. Cachar Tea Co. (1923) A.C. 48, at p. 70.

4 (1922) 38 T. L. R. 349, at 351.

untenable reason, he, the buyer, is liable in damages for his justifiable refusal because he gave a wrong reason for it."

Sir Mackenzie Chalmers has also questioned the correctness of this decision[1] and has observed: 'The *Braithwaite case* is not to be taken as impugning the general rule that a buyer who gives a wrong reason for refusing to perform his contract and afterwards discovers a sound reason, may rely on the sound reason.'

Braithwaite's case, however, has never been overruled, but whatever be the explanation of it or of its effect, it did not lay down the proposition that when there has been a repudiation by one party on a given ground and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract thus repudiated, and if it does lay down that proposition it is wrong[2].

Grounds for breach of contract.

It is a well established rule of law that a party to a contract may justify his failure to perform it on any ground which existed at the time of his refusal to perform, whether he knew of that ground or not at the time, or whether he gave that as his reason for his refusal or not, and it makes no difference if he gave some other and invalid reason[3].

Braithwaite's case does not apply at all to cases where a contract is repudiated not by anticipatory refusal to perform it before the time for performance arrives, but by failing to perform it when the time for performance has arrived.

It is also a well-known rule that justification is a conclusion of law which necessarily results from a given state of facts[4]. and therefore if any particular act is on the facts justified, whether it be complained of as a breach of contract or as a tort, it does not matter whether the right or the wrong reason or no reason at all was given for it at the time when it was done. A contrary view seems to have been expressed in *Nannier* v. *Rayalu Iyer*[5] though the case as reported is not very clear to be properly understood. There appears according to the report to have been a tender and a refusal of the goods in October and November, and in January the sellers wrote a

See Chalmers, Sale of Goods Act, 1893, 11th Edn., p. 99, f. n. (u).

Per Lord Sumner, British & Beningtons, Ltd. v. N. W. Cachar Tea Co. (1923) A. C. 48, at p. 70.

See Taylor v. Oakes, supra; Levy v. Green (1859) 1 E. & E. 969. 117 R. R. 552; Hession v. Jones (1914) 2 K. B. 421, at pp. 4242—5; Alexandar v. Webber (1922) 1 K. B. 642; Parthasarathy Chetty & Co. v. T. N. Gajapathy Naidu & Co. A. I. R. 1928 Mad. 1258=48 Mad. 787=91 T. C. 568.. (In this case the court suggested that there might be a difference if the seller had claimed as damages the difference between the contract price and the market price instead of the difference between the contract price and the price realized on a resale of the goods, which he had carried out under the express terms of the contract, but it is submitted, with great defence, that there appears to be no distinction between the two cases.

See Sutton v. Johnston (1786) 1 T. R., at p. 507, 1 R. R. 257.

A.I.R. 1926 Mad. 778=(1925) 49 Mad. 781=96 I. C. 673.

letter threatening to sell if the buyers would not accept the goods, in reply to which the buyers wrote that they would not accept on the ground that delivery had not been made in time. The court appears to have thought that the contract was kept open by the sellers until the 16th January, but a contract which has once been broken cannot be kept open; and an offer by the seller to tender the goods again, if the buyer will accept them, is in law proposal that the late acceptance should be treated as an accord and satisfaction of the breach and if such proposal is not accepted the only remedy for the seller is to sue for the original breach[1]. If therefore there was an actual tender and refusal to accept the goods in November, that refusal was a breach of contract, but if the goods tendered were not of the contract description the buyer was entitled to rely upon that fact, even if he gave as the ground for rejecting them that they were tendered late. This case, therefore. cannot be taken to lay down that a buyer, who rejects goods on the ground that they were delivered late, cannot afterwards show that the goods were not according to contract and escape liability on that ground[2].

Interest by way of damages and special damages

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of price—

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made.

Interest by way of damages—history of legislation.

The Interest Act 1839 (Act XXXII of 1839) based on Lord Tenterden's Act[3] provides for the payment of interest by way of damages in certain cases. That Act provides for the payment of interest at the current rate in the following cases:—

(1) On all debts or sums certain payable at a certain time, under a written instrument, from the due date mentioned in the instrument.

[1] cf. Mutthaya Maniagaran v. Lekku (1912) 37 Mad. 412=14 I. C. 255.

[2] See Pollock & Mulla, Sale of Goods Act, p. 325.

*Analogous law.

Section 54 of the English Sale of Goods Act, 1893, corresponding to Sec. 61 of the Indian Act, and section 49 (3) of the English Act to section 61 (2) (a) of the Indian Act, Section 61 (2) (b) of the Indian Act is new.

[3] 3 & 4 William IV, Ch. 42.

(2) On all debts or sums certain payable at a certain time from the time that demand is writing in made, with a claim for interest from the date of demand.

With regard to breaches of contract for payment of money, the rule in English law before the Law Reforms (Miscellaneous Provisions) Act, 1934, was that interest cannot be allowed at common law by way of damages for wrongful detention of a debt[1]. Lord Tenterden's Act, however, has by section 28 provided for the award of interest in particular case. This was bodily adopted, as already observed in the Interest Act of 1839. In *Juggomohn Ghose* v. *Kaisree Chand*[2], a case before the Privy Council prior to the passing of the Indian Contract Act, it was laid down in consonance with the rule of English common law that, in the absence of a mercantile usage, interest cannot by imported into a contract which contained no stipulation to that effect.

With the passing of the Indian Contract Act, there arose a considerable divergence of judicial opinion as to whether in view of illustration (*n*) to section 73, interest can be awarded as damges where it is not reasonable under the Interest Act, The view of the Calcutta High Court was that it could be[3]. Later case of other courts endorsed the view on the ground that in the fact of the worngful dentention of money itself there is proof of the extent of plaintiff's damages, and that the advantage that the plaintiff would have had if the money had not been detained, is stated in terms of money, interest at the current rate for the period of detention[4]. This view was not founded on illustration (*n*) to section 73. But in *Kamalmmal* v. *Perru Meera Levvai*[5] the Madras High Court held that interest cannot be recoverable under Section 73 illustration (n), where it was not recoverable under the Interest Act. According to this view, therefore, interest cannot be claimed for unlawful detention of money unelss there is an express or implied agreement or usage or compliance with the Interest Act. This view was reaffirmed by a later Full Bench in *Kandappa* v. *Muthurswami*[6]. That was a suit to recover money advanced towards a contract for supply of goods and the full Bench held that the party who had made the advance was not entitled to interest from the date of advance as the contract did not provide for it, and no demand had been made before suit. The Bombay and Patna High Courts had taken the same view[7]. The Lahore High

1 London, Chatham & Dover Ry. v. S. E. R. Co. (1893) A. C. 429, 437.

2 (1862) 9 M. I. A. 356.

3 Khetra Mohan v. Aswini Kumar (1917) 21 C. W. N. 488=45 I C. 667; See Navnitdas v. Mancharsa. A I. R. 1934 Nag. 78.

4 G. I. P. Ry. v. Jugal Kishore, A. I. R. 1930 All. 182=121 I. C. 828; Kishan Lal v. Bapu A. I. R. 1926 Nag. 363=94 I. C. 971; Ajodhya Prasad v. Shiv Prasad. A. I. R 1927 Nag. 18=97 I. C. 1019; Abdullah v. Alla Diya, A. I. R. 1927 Lah. 333=8 Lah. 310=100 I. C. 846; Ram Nath v. Hira Lal, A. I. R. 1926 Cal. 755=93 I. C. 647; Saiyid Muthuswamy v. Veeroswamy, A. I. R. 1936 Mad. 486.

5 (1897) 20 Mad. 481; Anrudh Kumar v. Lakshmi Chand (1928) 50 All. 818=115 I. C. 114=A. I. R. 1928 All. (n) Ill. (n) is not exaustive; Saiyid Ismil v. Saiyid Mehdi, A. I. R. 1924 All. 881=80 I. C. 63.

6 A. I. R. 1927 Mad. 99=(1927) 50 Mad. 94=99 I. C. 609; See also Raja Ram Dass v. Gajapathi Krishna Chandra A. I. R. 1933 Mad. 729=145 I C. 721; Nanchappa v. Vatsari, A. I. R. 1930 Mad. 727; Arjunsa v. Mohanlal, A. I. R 1937 Nag. 345=17 I. C. 812.

7 A. I. R. 1924 Bom 131=87 I. C. 122 A. I. R. 1933 Pat. 196=146 I. C. 56.

Court followed the Madras view in one case[1] but other case of the same court were inclined to take a broader view on the basis of compensation for worngful detention[2]. The Allahabad High Court held in *Abdul Jalil* v. *Mohammad Abdul Salam*[3] that apart from the Interest Act and section 73, Ill.(*n*) interest may be awarded on general grounds of equity, but the decisions were conflicting[4]. The Judicial Committee of the Privy Council has now conclusively decided in *B. N. Ry, Co.* v. *Ruttanji Ramji*[5] that section 73 is only declaratory of Common Law as to damages and that illustration (*n*) does not modify the language of the section or confer on a creditor a right to recover interest upon a debt due to him when he is not entitled to such interest under any provision of law. This means that usage of trade, in the absence of an express or implied contract to pay interest or a usage of trade, interest can be claimed only under the Interest Act.

The present section of the Indian Sale of Goods Act, 1930, makes an express provision for the award of interest in case of breach of contract for sale of goods.

Seller's right to recover interest—section 61 (2) (*a*).

In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price, to the seller in a suit by him for the amount of the price from the date of the tender of the goods or from the date on which the price was payable. It is thus clear that the seller can only recover interest when he is in a position to recover the price. When he can only sue for damages for breach of contract, he is not entitled to interest under the provisions of this sub-section.

The date from which interest is payable must be ascertained from the terms of the contract. In a case of a sale of specific goods, where nothing is said about credit or delivery, the price will be payable on the date of the making of the contract, and interest will be recoverable from that date. Where the price is to be paid on a specified day, irrespective of whether the goods are delivered or not, that day will be the date from which interest will be recoverable and so on.

Where delivery is to be made at the option of the seller during a stated period, such as the last fortnight in a specified month, or during a specified month, and payment of the price is only due on delivery, the date of delivery or of the tender of goods, will be the date from which interest can be claimed. As instance of it, if there be a contract for the sale of specific goods and the property passes to the buyer and the goods are to be delivered, say in March, the

1 Kirpal Singh v. Jiwan Mal, A. I. R. 1927 Lah. 287=101 I. C. 644.

2 Piare Mohan v. Gopal Lal, A. I. R. 1932 Lah. 552=158 I. C. 156 ; Gujranwala Municipal Committee v. Charanji Lal. A. I. R. 1935 Lah. 685=160 I. C. 574 ; Sham Singh v. Nanak, 136 I. C. 719 ; M. C Gujranwala v. Prabhu Dial, A. I. R. 1933 Lah. 556=146 I. C. 154.

3 138 I. C. 158=A. I. R. 1932 All. 505 See also A. I. R. 1928 All. 500.

4 Lalman v. Chintamani (1919) 41 All. 254 ; Jwala Prasad v. Hoti Lal (1924) 46 All. 625 ; Saiyid Ismail Hasan v. Saiyid Mehdi A. I. R. 1923 Ran. 265.

5 A. I. R. 1938 P. C. 67=178 I. C. 15=I. L. R. (1938) 2 Cal 72.

price being payable on delivery, and the seller tenders delivery on the 15th of March, and the buyer wrongfully refuses to accept it, the date from which interest will be recoverable will be the 15th March.[1]

Buyer's right to recover interest—section 61 (2) (*b*).

Sub-section (2) (*b*) introduces an altogether new provision for payment of interest to the buyer on the price, in a suit brought by him for refund of the price, in consequence of a breach of the contract on the seller's part. The interest in this case is to run from the date on which the payment was made. In this case also the buyer can only recover interest when he is entitled to recover the purchase price, that is to say, when he can sue for the price prepaid as money had and received, by reason of total failure of consideration. He cannot recover interest when his only remedy is to sue for damages, for instance, for a breach of warranty, even though those damages may be sufficient to extinguish the price.

It is also essential for the application of this clause that there should be a breach of contract on the part of the seller. It will not, therefore apply, for instance, where a case arises under sections 7 and 8 or where the contract is dependent upon some condition inserted for the benefit of the seller, and is not performed owing to the non-fulfilment of that condition. A contract may also be frustrated by circumstances over which the seller has no control, so that in law he would not be liable to action, giving the same result. If a contract is rescinded by mutual consent, it must depend upon the terms of the rescinding agreement whether the buyer may recover interest. Under English law, interest is recoverable where money is obtained by fraud, and it would seem therefore that if the buyer rescinds the contract on the ground that it was induced by fraud, he can recover interest under this section, but it is more doubtful whether he can recover it if he succeeds in setting aside the contract on the ground that in such cases the parties are to be restored as far as possible to their original position[2].

If a buyer could not obtain delivery of the goods sold owing to the resistance of the creditor of the seller who has attached them he is entitled to recover the purchase money paid with interest thereon under S. 61 of the Act[3].

In a suit for return of the sale price paid under a contract of sale of goods on the basis of a breach and total failure of consideration and for damages for breach of contract by reason of non-delivery of the goods sold, the plaintiff is entitled to a return of the price paid by him with interest thereon from the date on which it was paid till date of judgment as compensation for having been kept out of his money and also damages for breach, the measure of damages being the difference between the contract price and the market price of the

1 See Pollock & Mulla, Sale of Goods Act, page 334.

2 See Pollock & Mulla, Sale of Goods Act, page 335 citing In re Metropolitan Coal Consumers Association (1892) 3 Ch 1. 17, C. A.

3 Damodar v. Allabux, 1948 Nag. 362 = 1948 N. L. J. 508 = I. L. R. (1948) Nag. 762.

goods on the date of breach. The material date is the date of the breach and not the date of trial of the suit.[1]

Special damages—sub-section (1).

Damages are either general or special. "Special damage, when contrasted with general damage means the particular damages beyond the general damages which results from the particular circumstance of the case[2]." Section 73 of the Indian Contract Act deals with both classes of damages. The words; "compensation for any loss or damage......which naturally arose from the usual course of things from such breach" refer to general damages. The expression: "or which the parties knew when they made the contract to be likely to result from the breach of it," refers to special damages. The case of *Hydraulic Engineering Co.* v *McHaffie*[3] is an illustration. In this case, the defendant knew of plaintiff's contract with a third party for suply of an important piece of machinery and yet failed to supply it with the result that the plaintiff had to commit a breach of contract. The defendant was held liable for the plaintiff's loss of profit as well as his charges for making other parts of the machine. "Where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account[4]." In *Kasler* v. *Slovauski*[5] there was a chain of buyers and sellers in a string contract and in an action for breach of warranty, the first buyer was held entitled to recover from the first seller the damages which the last buyer in the chain had recovered from his vendor, and the costs of all the actions between the intermediate vendors[6].

Speaking about the English Sale of Goods Act, 1893, Sir Mackenzie Chalmers observes[7]:

> "The Act deals only with general damages, and merely saves the law relating to special damages. Many of the cases fail to distinguish special from general damages, the reason being that both are governed by the same guiding rule. Given a particular contract, the measure of damages is the loss which naturally results from the breach of a contract of the kind in question. Given a contract made under special circumstances to the knowledge of both parties *e g*. a contract to fulfit a sub-contract, the measure of special damage is the loss which naturally results from the breach of a contract made under those particular circumstances. The underlying principle on which special damages are allowed appears to be this. When a contract is entered into by parties with knowledge that there are special circumstances attaching to it, which, in the ordinary course of things, would produce special loss if the contract were broken, the law implies a liability to pay damages for such special loss."

In *Hammond v Bussey*[8], a case where the action was brought for breach of warranty, Fry L. J. suggests four tests for determining whether the damages which actually resulted from the breach of

4 Rameshwardas Poddar v. Paper Sales Ltd., 1944 Bom. 21; 45 Bom. L. R. 906.

2 Ratcliffe v. Evans (1892) 2 Q. B. 524, at p. 528, per Bower, L. J.

3 (1878) 4 Q. B. D. 670 (cf.) Patrick v. Russo-British Grains Export Co. (1927) 2 K. B. 535.

4 Hydraulic Engineering Co. v. McHaffie, supra, per Cotton L. J. p. 677.

5 (1928) 1 K. B. 78; Hall v. Pim (1928) 139 L. T. 50. (cf.) Williams v. Agius (1914) A. C. 510.

6 For a full discussion of the law as to special damages, see Indian General Navigation Railway Co. v. Eastern Assam Co. (1920) 47 Cal. 1027 : A. I. R. 1921 Cal. 315.

7 Chalmers, Sale of Goods Act, 11th Edn., p. 143.

8 (1887), 20 Q. B. D. 79, at p. 100, C. A.

? (2) Was the contract made under any special circumstances, and, if so, what were those circumstances ? (3) What, at the time of making the contract, was the common knowledge of both parties ? (4) What may the court reasonably suppose to have been in the contemplation of the parties as a probable result of the breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach ?

This section preserves the right of a party to a contract of sale to recover special damages in any case where by law special damages may be recoverable.

In the cases noted below recovery of special damages was considered and decided:—

(1) in *Smeed* v. *Foord*[1], the defendant had contracted with the plaintiff, a farmer, to furnish, within three weeks after July 24, a steam threshing engine, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat, so that it could be sent at once to market. He did not deliver the engine until September 11, but from time to time repeatedly assured the plaintiff that it was coming shortly. The plaintiff was therefore obliged to carry the wheat home and stack it, and while stacked it was damaged by rain and had to be dried in a kiln. There was a further loss by reason of a fall in prices on resale. *Held*, that the defendant was responsible for the plaintiff's loss by the deterioration of the wheat and his expenses of carting, stacking, and kiln-drying, but not for the fall in the market price, as this loss could not have been reasonably anticipated by the parties as the probable result of delay in delivery.

Conversely, the seller could not have claimed that a rise in the market price could be taken into account to mitigate the damages

(2) In *Borries* v. *Hutchinson*[2] the plaintiff had bought from defendant seventy-five tons of caustic soda, deliverable in three equal parts, in June, July and August. The buyer at the time made a like contract for resale at a profit to H, a St Petersburg merchant. The latter in his turn made a sub-sale at a profit another merchant in St. Petersburg The seller, at the time of the contract, knew that the soda was bought for sale on the continent, and was to be shipped from Hull, but there was no evidence that he then knew that it was to be shipped to Russia Some of the soda was delivered late, and the plaintiffs were compelled to pay increased freight and insurance, owing to the approach of winter, on dispatching it to Russia. The rest was not delivered : and the plaintiffs had to pay a sum of money to the merchant in Russia to compensate him for damages which he had to pay to a buyer from him. There was no market where the plaintiffs could purchase caustic soda.

Held, that the buyer was entitled to recover as damages:—(1) his lost profits on the resale, and (2) all his additional expenses for freight and insurance ; but (3) not the damages paid to H, his vendee, for the latter's loss on the sub-sale, those being too remote, as the seller did not, at the time of making the contract, knew of the sub-

1 E. & B. 602, L. J. Q. B. 17 B ; 117 R. R. 365.

2 18 C. B. (N.S.) 445 ; 34 L. J. C. P. 169, 114 R. R. 563.

sale to the second merchant in St. Petersburg. *Held*, also, per Willes J., that, even had he known, he could not be taken to have contracted to be responsible for such remote consequences.

This is a case in which, in the absence of an available market, the price obtained on the resale can be taken as the value of the goods. The increased freight, however, was special damage.

(3) The defendant had agreed to supply the plaintiffs with certain sets of wheels and axles during the months of February to April, 1872. This contract was subsidiary to one which the plaintiffs had made to supply a Russian Railway Company with waggons by two deliveries in May of the same year, under penalties for delay. The defendant had notice of this sub-contract, but not of the date of delivery, or of the *amount of* the penalties. By reason of the defendant's delay in delivery of the goods, which were not obtainable in the market, the planitiffs had to pay £100 to the Russian Company as penalties. *Held*, that the plaintiffs were not entitled, as a matter of law, to recover the amount of the penalties as such, but that the jury might reasonably assess the damages at that amount.

(4) In *Hydraulic Engineering Co.* v. *McHaffie*[1] the plaintiffs, being uuder a contract with Justice for the supply of a peculiar machine by the end of August, 1878, contracted with the defendants to make a part of the machine as soon as possible. The defendants were expressly informed of the plaintiffs' contract with Justice and that the machine was wanted by Justice at the end of August, but did not complete their part of it until the end of September. Justice then refused to accept the machine, which was unsaleable in the plaintiff's hands. Under these circumstances the plaintiffs were held entitled to recover damages for :—(1) loss of profit on their contract with Justice ; (2) expenditure uselessly incurred in making other parts of the machine ; and (3) cost of painting it to preserve it but not of warehousing it.

(5) The plaintiffs bought from the defendants certain sheepskins for the purpose, as the defendants knew, of reselling them to a buyer in France at a profit to the plaintiff of 5 francs a skin. The defendant failed to deliver the skins, and the plaintiff was condemned to pay damages by the French courts for breaking his contract with the French buyer. The skins could not be obtained in the market. The plaintiff was held entitled to recover not only the loss of profit but the damages which he had paid in addition[2].

(6) In *Agius* v. *Great Western Colliery Co.*[3] the plaintiff- a coal merchant, contracted with shipowners for the supply of coal to their ships at a certain port, and entered into contracts with the defendants for the supply of coal to him for shipment in those steamers. The defendants failed to deliver within the contract time, and consequently a steamer was delayed. The plaintiffs when sued for damages put at £150 defended the action and paid £20 into court, which was found to be sufficient. *Held*, that the plaintiff was entitled to recover from the defendants the £20 paid into court and

1 4 Q. B. D. 670 (C. A.). (1885) 15 Q. B. D. 85, C. A.
2 Grebert Borgnis v. J. & W. Nugent
3 (1899) 1 Q. B. 413, C. A.

his costs reasonably incurred over and above the amount which he had received as costs between party and party in that action.

(7) In *Hall* v. *Pim*[1] there was a sale with a resale and a succession of sub-sales of a cargo of Australian wheat of a certain quality and description for future shipment in November. Subsequently a particular ship was nominated in the following January as the ship which was carrying the cargo, but though the seller had the documents in March they deliberately refused to deliver them to the buyers. The contract was made subject to the conditions of the London Trade Association. It was held by the House of Lords that the sale was the sale of a cargo of an individual ship, and not merely the sale of corn in bulk, and by the terms of the contract it was contemplated that the buyer might re-sell the cargo and in such a case the seller agreed to put the buyer in a position to fulfil his contract. The buyer was therefore entitled to recover as damages the loss of profit on his sub-contract and also to be indemnified against any damages which he might have to pay to sub-purchasers.

Analysis of the cases referred to above will show that where the goods are bought, to the knowledge of the seller at the time of making the contract, for resale and no market exists for the goods, the buyer may recover as special damages the difference between the contract price and the sub-sale price *i e.*, the profits as such of the sub-sale ; for as the buyer cannot supply himself elsewhere, the loss of profits naturally results from the seller's breach of contract under the special circumstances. But even where the sub-contract is not known to the seller, the price at which the buyer, in the absence of a market price, resells the goods to a sub-buyer is relevant to the measure of damages, as being some evidence of the value of the goods at the date appointed for delivery, and if the jury regard this evidence as satisfactory, they may award the buyer the difference between the contract price and the sub-sale price as general damages[2].

The case of *Hall* v. *Pim* is an exception, but it was decided on the particular terms of the contract which contemplated a series of string contracts with sub-purchasers. It is to be observed that as the buyer had committed himself to sell that particular cargo, it would not have been a performance of his contract if he had tendered other corn to his sub-purchasers. Where, however, the contract is for the sale of unascertained goods and there is a market, the difference between the market price and the contract price is the measure of damages, even if the seller knew that the buyer wanted the goods for the purpose of re-sale[3].

Failure of consideration.

"It is a well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another under circumstances which render the

1 (1928), 139 L. T. 50 ; H. L., 33 Com. Cas. 324.

2 See Benjamin on Sale, 7th Edn., p. 1017.

3 See Williams v. Reynolds (1865) 6 B. & S. 495. 141 R. R. 488 ; Grebert-Borgnis v. Nugent (1885) 15 Q. B D. 85 C. A. at p. 89. For a summary of the rules as to damages for non-delivery see Benjamin on Sale, 7th Edn., pp. 1018-1020.

receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed[1]." The general rule applicable to all contracts is equally applicable to sale of goods. Where the consideration for payment of the price has wholly failed, or where there has been a total failure of a severable part of the consideration, the price if paid, or a proportionate part thereof respectively, can be recovered by the buyer as money had and received to his use by the seller[2]. Thus in *Piari Lal* v. *Mina Mal*[3] it was held that a buyer who had made payment for goods to be delivered at a later date was entitled to recover the sum paid when the seller failed to effect delivery. Such failure of consideration may also be pleaded as defence to an action for the price[4] But if the failure of consideration is in any way traceable to the buyer's own fault. he cannot recover[5].

When the seller fails to deliver the goods or tenders goods which the buyer lawfully rejects; and even if the buyer has had the use of the goods and is deprived of them by their true owner, he may recover the price for the breach of the condition as to title.[6] Normally, however, where the buyer has had the goods he cannot recover the price as money had and received, and must bring an action for damages; *unless indeed he can rescind the contract.* Similarly, money given for a forged bill or note or railway scrip, bonds which are valueless as not being properly stamped, or specific goods which were not in existence at the time of the contract or have ceased to exist before the risk has passed to the buyer can be recovered. It is to be observed, however, that when, under the contract of sale, the risk has been transferred to the buyer, and the goods perish, he has to bear the loss and cannot recover the price and generally if performance of a contract is frustrated, money paid and payable while the contract was still in force cannot be recovered; the loss lies where it falls[7].

Partial failure

In cases where the consideration has failed only in part the money cannot be recovered unless the consideration is severable[8]. A distinction must be made between "a failure of part of the consideration and a partial failure of the consideration." Benjamin has observed :—

"A failure of part of an entire consideration is a failure of the whole consideration, and the rule of law is in such cases that 'where a sum of money has been paid for an entire consideration and there is only a partial failure of consideration, neither the whole or any part of such sum can be recovered.' On the other hand, if the consideration be originally severable a failure of part is a total failure of that part, but of that part only and the buyer's rights are unaffected by the acceptance of the other parts of the consideration."

1 Royal Bank of Canada v. The King (1913) A. C. 283, 296, P. C.

2 Chanter v. Leese (1839) 5 M. & W. 698, 701, Ex. Ch.; 51 R. R. 584, 600, 601; Biggerstaff v. Rowatt's Wharf Ltd. (1896) 2 Ch. 93 C.A., at pp. 100,101,103; Devaux v Conoly (1849) 8 C. B. 640; 79 R. R. 659; Rowland v. Divall (1923) 2 K. B. 500

3 (1928) 50 All. 82; see also Mathura Mohan v. Rama Kumar (1916) 43 Cal. 790=35 I. C. 305.

4 Biggerstaff v. Rowatt's Wharf, (1896) 2 Ch. 93.

5 Boston Deep Sea Fishing Co. v. Ansell, (1888) 39 Ch D. 339; Hall v. Burnell, (1911) 2 Ch. 551,

6 Rowland v. Divall, (1923) 2 K. B. 500, C.A.

7 See Pollock & Mulla, Sale of Goods Act, page 332; Chandler v, Webster, (1904) 1 K. B 493, C. A.

8 Biggerstaff v. Rowatt's Wharf, supra; Cox v. Prentice, (1815) 105 E.R. 641; 16 R.R. 328.

In *Johnson* v. *Johnson*[1] where a house and parcel of land which had been separately valued, were sold for the aggregate of the value, and the plaintiff who was evicted from the house owing to defect of title, sued for the return of the purchase money of the house without giving up the land, it was held that the bargain was in effect two contracts and that the plaintiff could recover.

Where the contract is entire and the seller fails to perform part of it, the buyer may treat such failure as a total failure to perform the contract, and recover the price[2] but if he accepts the partial performance then there is only a partial failure of consideration and neither the money nor any part of it can be recovered as money had and received[3].

A contract, though originally entire, may be rescinded partially, and the money paid for the part unperformed could be recovered, where the contract is capable of severance, and the conduct of the parties shows assent to such severance.[4]

Lien for storage charges.

In the case of sale of goods though the vendor has no lien for storage charges it is open to parties to make it a term of the original contract that the owner should pay for the upkeep of the chattel while it is detained as a lien for non-payment of the price[5].

Rate of exchange.

Generally speaking when a claim is to be converted into the currency of the country the rate of exchange of the date of breach is taken[6].

1 (1802) 127 E. R. 89; 6 R. R. 736.
2 Giles v. Edwards, (1797) 7 T. R. 181, 4 R. R. 414.
3 Harnor v. Graves, (1855) 15 C. B. 667, 100 R. R. 535.
4 Devaux v. Connolly, (1849) 137 E. R. 658; 79 R. R. 659. See also notes under section 37.

Hazarimal v. Champalal, 1943 Nag. 141 207 I. C. 145=I. L. R. (1943) Nag. 272.
Le Beaupin v. Crispin (1920) 2 Q. B. 714; non-delivery of goods sold, rate of exchange on the date of the breach taken. See also Re Hodgson & Co. (1920) W. N. 198.

CHAPTER VII.

MISCELLANEOUS.

Exclusion of implied terms and conditions.

***62.** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

This section is merely an application of the general maxims *Expressum facit cessare tacitum* and *Modus et conventio vincunt legem.* A sale is consensual contract and the parties may alter at will the obligations which the law implies from the general nature of the contract[1]. As observed by Lord Blackburn, discussing the correlative obligations of payment and delivery : "There is no rule of law to prevent the parties from making any bargain they please[2]". Of course, if the agreement is forbidden by law, opposed to public policy, or immoral, it is void and of no legal effect. What is meant by saying that the parties can make any bargain they please is that they can impose any conditions they like and thereby exclude the application of any terms or conditions which the law attaches to such contracts generally. The Act does not compel the parties to make their contracts according to the rules of law which it contains, and they may make what terms they please, provided that the contract is not illegal. Thus they may exclude any of the terms or conditions which the law usually attaches to a contract of sale, and create for themselves any special rights and obligations that they please, including, if they are so minded, provisions whereby the seller may derive an advantage from his own default[3].

It is thus clear that the provisions of the Act are not absolute rules of law, but presumptions which could be negatived or rebutted by the express or implied terms of the particular contract.

Nature and extent of the rule.

While applying this rule in estimating the effect of an express stipulation, in the words of Willes J, it must be borne in mind that

***Analogous law.**
See 55 of the English Sale of Good Act. 1893—Appendix A.

1 See Chalmers, Sale of Goods Act, 11th Edn., p. 146.

2 Calcutta Co. v. De Mattos (1863), 32 L.J.Q.B. 322, at p. 328.

Lancaster v. Turner (1924), 2 K.B. 222 C.A. See also In re Bourgeois and Wilson Holgate & Co, (1920) 25 Com. Cas. 260; Sitaram Bhanrao Deshmukh v. Sayyad Sirajul Khan, 42 I.C. 32 (35) 41 Bom. 636.

"the doctrine that an express provision excludes implication does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer." This principle is confirmed by section 16, clause (4) *supra* which provides that "an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith." French Law goes even further and provides that where a stipulation in a contract of sale is ambiguous, it is to be construed in favour of the buyer.[1] This rule was recognised in Roman Law when it laid down: "*In contrahenda conditione ambiguum pactum contra venditorum interpretandum est.*"[2] In England the same result has been arrived at occasionally by giving effect to the maxim,—"*Verba Chartarum fortius accipiuntur contra proferentem.*[3]"

The provisions of this section are also subjects to the ordinary rules governing the admissibility of oral evidence in relation to written contracts[4], which in India are contained in section 92 of the Indian Evidence Act, 1872. To exclude a term implied by law, the express agreement must be inconsistent with it[5] For instance, lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract they have made[6].

Implied terms

The question of what terms are to be implied in a contract is a question of law 'The court, and not the jury, are the tribunal to find such a term : they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included. It must be such a necessary term that both parties must have intended that that should be a term of the contract and have only not expressed it because its necessity was so obvious that it was taken for granted[7]".

Express agreement

The express agreement, to have the effect of excluding the term implied by law, must be one inconsistent with it[8]. Thus where an express warranty is perfectly consistent with a warranty implied

1 See French Civil Code, Art 1602
2 Chalmers, p. 147.
3 The words of a deed are construed more strongly against the grantor. See Roe v Tranmarr 2 Wils. 75; Per Blackburn J in Fowkes v. Manchester Life Assn 32 L J.Q.B. 153 (159).
4 Re Walker, Winser etc. (1904) 2 K B 152.
5 Section 16, clause (4) supra; Bigge v Parkinson, 7 H. & N. 955.
6 Re Leith's Estate, L.R 1 P.C. 296 (305). See also United States Steel Products Co. v. G. W. Railway, (1916) A.C. 189 (195) H.L.
7 In re Comptoir Commercial Anversois and Power Son & Co. (1920) 1 K B 868, 899—900, C.A.; Tournier v. National Provincial & Union Bank of England (1924) 1 K B. 461, C A.; Official Assignee of Madras v. Frank Johnson Sons & Co (1931) 54 Mad. 409=A.I.R. 1931 Mad 65=128 I.C 849
8 Section 16 (4) ante; Bigge v. Parkinson (1862) 7 H & N. 955; 126 R. R 789; Johnson v. Raylton (1881) 7 Q B D. 438, C.A; Mody v. Gregson (1867 L.R. 4 Exch, 49 Ex. Ch; Drummond v. Van Ingen (1887) 12 App. Cas. 284.

by law, the latter will not be displaced[1]. The principle of this section was applied in a recent Allahabad ruling in which parties had agreed that the seller might resell against the buyer in breach, even though the goods might not have been appropriated towards the contract[2].

The agreement by which it is sought to vary or negative the incidents arising by implication of law from the contract of sale must be express and not to be only implied from the circumstances of the case, except in the case where instead of an express agreement reliance is placed on the course of dealings between the parties, in which case of agreement to such effect may be inferred from such dealings. So where the parties have come to an express agreement none can be implied,[3] and where the parties have expressed in words or acts the condition or warranty by which they mean to be bound, any other condition or warranty inconsistent therewith is excluded thereby.[4] So also an express warranty is never extended by implication of law.[5] But these limitations, as has been already pointed out, do not apply where the express provisions appear to have been superadded for the benefit of the buyer[6].

Exclusion of terms implied by the Act must be in clear and unambiguous language.

The party who wishes to exclude or escape from terms and conditions by which he would normally be bound must do so in clear and unambiguous language. He cannot rely on an ambiguous document. The Act definitely draws distinction between conditions and warranties. Sometimes the parties use the word "warranty" or "guarantee" in their contracts, when in all probability they mean what the Act calls a condition, with the result that they find that they have not excluded an implied condition, by which therefore they are still bound[7] In particular the efforts to exclude by agreement the buyer's right to reject are constantly failing owing to a failure to appreciate the full results of the implied condition that the goods must answer the description or be of the contract quantity[8].

1 Bigge v. Parkinson, supra, cf. Elderslie S. S. Co. v. Borthwick (1905) A. C. 93, Gordon Alison v. Wallsend S & Eng. Co. (1926) 43 T.L.R 104.

2 Sheo Narain v N S. S. & G. Co., A.I.R. 1938 All. 272 – 175 I. C. 552.

3 Catter v Powell, 6 T. R. 320.

4 Parkinson v. Leep 2 East 314.

5 Dickson v Zizania, 20 L J. C. P. 72.

6 Mody v. Gregson, L. R. 4 Exch. 49 (53); Drummond v. Van Ingen, 12 App. Cas. 284 (294).

7 See, for instance, Wallis v. Pratt (1911) A. C. 394; Baldry v. Marshall (1925) 1 K. B. 260, C. A.: A. Barker (Junior) & Co. v. Agius Ltd. (1926) 33 Com. Cas. 120, (1927) 43 T. L R 751.

8 See Pollock & Mulla, Sale of Goods Act, p. 337.; Green v. Arcos (1931) [T. L. R. 333, C. A., Meyer Ltd. v. ...htio Carelia Timber Co. (1930) ...om. Cas. 17, 142 L. T. 460. "I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart Commercial men carry on an enormous mass of business under the system of 'string contracts,' under which A, who has made a contract with B, goes to arbitration with Z, of whom he never before heard and with whom he has in the eyes of the law no contractual relations. Their view of damages as a sufficient remedy for breach of contract entirely differs from the law's remedy of rejection. The commercial man does not think there can be no contract to make a contract, when every day he finds a policy, 'premium to be agreed' treated by the law as a contract."
L. J W. N. Hillas & Co. v. (1931) 36 Com. Cas. 353,

dealing.

In *Pocahontas Fuel Co* v. *Ambatielos*[1] McCardie J. discussing the expression observed :

"That phrase means, I conceive, that past business between the parties raises an implication as to the terms to be implied in a fresh contract, where no express provision is made on the point at issue......I think that a course of dealing may arise with equal force whether from a written or parol bargain, or from the repeated occurrence of similar methods as between the parties. In each case the question is as to the implication to be drawn from the past as applied to a new transaction."

As in the case of express agreement, the course of dealing must point clearly to an ambiguous agreement to create obligations or rights which do not normally attach to a contract of sale, or to negative or vary those which normally attach. It is also doubtful whether parties can, by course of dealing, practically contract themselves out of the essential requirements of the statute, for instance, dispense with the necessity of tendering the proper documents under a c.i.f. contract[2].

In *Haridas Ranchordas* v. *Mercantile Bank*[3] it was held that the course of dealings between the Bank and its customer (to whom overdrafts had been allowed) showed that there was an agreement to pay compound interes. In *Venkatachalam* v. *Ponnuswami*[4] in a suit by a commission agent for value of goods consigned, where the defendants pleaded negligence of the plaintiff in not getting the goods insured, the court held from the course of dealings between the parties which showed that the goods were always sent without being insured, that the incidence of the risk lay with the defendants. Similarly, in *Alagappa* v. *Roopchand*[5] the court declined to apply Section 91 of the Contract Act (relating to proper delivery to the carrier) to the circumstances of the case, as the long course of dealings between the parties decidedly pointed to the exclusion of Section 91 (of the Contract Act) with regard to the dealings between the parties.

It has been observed that evidence of previous course of dealings between the parties is only admissible to explain the meaning of the terms used in a contract and not to impose on a party an obligation as to which the contract is silent.[6] Where it is necessary to imply some term and no rule of law applies, a usual practice or course of business which the parties may be presumed to have known and with reference to which. it is reasonable to suppose, they contracted, becomes material to show their intention though it is not a definite or uniform practice.[7] So delivery of less or more than the contract quantity or the passing of the risk when the contract is silent may be good subjects to be governed by course of dealing between the parties.[8]

1 (1922) 27 Com. cas. 148, 152, 158.
2 Malmberg v. H. J. Evans & Co. (1924) 41 T. L. R. 38, 40, C. A., per Atkin L.J., 30 Com. Cas 107 ; cf. Steel Brothers, Ltd. v. Dayal Khatao & Co. (1923) 47 Bom. 924=A. I. R. 1924 Bom. 247=87 I. C. 67.
3 A. I. R. 1920 P. C. 61=44 Bom. 474=55 I. C. 522.
4 A. I. R. 1925 Mad. 46=82 I. C. 586.
5 A. I. R. 1929 Mad. 635 ; (cf.) Holmes Wilson v. Bala Kristo. A. I. R. 1927 Cal. 668=(1927) 54 Cal. 549.
6 Ghellabhai v. Nandubhai, 20 Bom. 238.
7 Remfry, p. 502, citing Lewis v. G. W. Ry. 3 Q. B. D. 195; The Curfew (1891) P. 131 but see the Nifa (1892) p. 411 ; Walker v. Johnson, 10 M. & W. 161 ; Watts v. Grant, 26 Sc. L. R. 660 ; Dickenson v. Lano, 2 F. & F. 188.
8 See Remfry, pp. 264, 220 ; Dunlop v. Lambert, 6 C. & F. 600 H. L.

Usages.

In commercial transactions extrinsic evidence or custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. This is done upon the principle of presumption that in such transactions, and in such contracts the parties do not mean to express in writing the whole of the contract by which they intend to be bound, but they contract with reference to those known usages[1]. If there is an invariable certain and general usage or custom of any particular trade or place, the law will imply, on the part of one who contracts or employs another to contract fro him upon a matter to which such custom or usage has reference, a promise for the benefit of the other party in conformity with such usage or custom, provided there be no express stipulation between them which is inconsistent with such usage.[2] When, however, such invariable usage is proved it is to be considered as the basis of the contract between the parties, and their respective rights and liabilities are held to be precisely the same as if without any usage they had entered into a special agreement to the like effect[3] This is in conformity with the maxim "*In contractibus tacite insunt eaquae sunt moris et consuetudinis.*" This tacit variation of the terms from those which would otherwise be implied by law, has the same effect as if it was express[4]. This rule is, however, subject to the following two qualifying exceptions[3], namely, (1) as regards a person who does not know and assent to a usage, a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character[5]; and (2) if and so far as a contract of sale is in writing[6], evidence of any usage inconsistent with the writing is inadmissible[7].

Usages are imported into contracts as implied terms, not because they have any intrinsic authority, but because the parties are deemed to have contracted with reference to them[8]. A business custom, therefore, as opposed to a land or family custom need not possess the attribute of antiquity[9]; and, whilst the length of time during which a usage has existed is of some importance in determining whether it has become established[10], it may be of recent origin[11]. It may be in the course of growth[12].

To make out a trade usage it need only be shown (*i*) that it is certain and part of the agreement between the parties by necessary

1 Per Lord Wensleydale, in Hutton v. Warren, 1 M. & W. 466 (475).

2 Per Lord Attenborough in Raitt v. Mitchell, 4 Camp. 146 (149), followed in Volkart Brothers v Vettivelu Nadan 11 Mad. 459 (461)

3 Ibid.

4 Per Blackburn J. in Mollett v. Robinson, L. R. 7 C. P. 84 (103). cf. Produce Brokers Co. v. Olymphia Oil and Cake Co. (1916) A. C. 314 (331) S. C. (1917) I. K. B. 320 (330).

5 Chalmers, p. 148.

6 Mollett v. Robinson, L. R. 5 C. P. P. 656 and Robinson v. Mollett, L. R. 7 H. L. 802.

7 Miller, Gibb & Co v. Smith and Tyrer, (1917) 2 K B 141 C. A. Re Sutro & Co. (1917) 2 K. B. 348 C. A.

8 See Pollock & Mulla, Sale of Goods Act, p. 338

9 Jamna Das v Chetandas, A I. R. 1928 Bom. 487 = 112 I. C. 610, following Plaid v. Allcock, (1866) 176 E. R. 913, 142 R. R. 747; Bechuanaland Exploration Co. v. London Trading Bank (1898) 2 Q. B. 658; Moult v. Halliday (1898) 1 Q B. 125.

10 Edelstein v. Schuler & Co. (1902) 2 K. B. 144.

11 Bechuanaland Exploration Co. v. London Trading Bank, supra.

12 Moult v. Halliday, supra.

implication, (*ii*) that it is reasonable and not inconsistent with law[1] (*iii*) that it was so universally acquiesced in that every body in the trade knew it or could have ascertained it, if he had taken the pains to enquire[2]. It is not necessary to prove that the party who is sought to be bound by it was actually aware of it. "*The usage must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract*"[3]. For a decision to be based upon a usage of trade, there must be sufficient evidence to show that the usage was so universal as to become part of the contract between the parties by operation of law[4]. Where there is reliance on custom there is necessarily a variation from the written contract, but the variation should not be in contradiction of or repugnant to it[5]. Evidence of a custom not inconsistent with the contract can be admitted but a mercantile custom obliging the purchaser in contravention of the written contract, for instance, to accept goods not of the stipulated kind can be of no avail in a suit for the recovery of goods under the contract.[6]

A usage must be general and it is not sufficient that it should be recognised as applying to a majority of cases[7]. The party setting it up must prove it, if it be disputed[8]. The usage to be binding, must be known or taken to be known to both parties[9]. The most cogent evidence of usage is not that which is afforded by the expression of opinion as to its existence, but the enumeration of instances in which the alleged usage has been acted upon and the proof afforded by judicial or revenue record or private accounts and receipts that the usage had been enforced[10]. The series of acts by which an usage is to be established must be uniform and constant[11]. Litigation is a test of the existence of a custom but not its sole proof[12]. There is a difference between custom and what is customarily done[13] An usage implies a rule which must be followed under compulsion[14], and to which the party benefitted can claim adherence by the other party as of right,[15] and not only as a business practice[16], though a business practice also if long continued may raise a presumption of its being compulsory[17]. It is not sufficient to prove that certain leading merchants of a place consider it desirable.[18]

1 Mercantile Bank v Rochaldas, A I. R 1926 Sind 225.
2 Russian Steam Navigation Trading Co. v. Silva (1863) 143 E. R 242; 134 R. R. 676; Robinson v. Mollett L R. 7 H L. 802, cited in Paul Beier v. Chotalal, 30 Bom. 1 (15)
3 Juggmohan v. Manik Chand (1859) 7 M. I. A. 263. See also Chandanmull v. National Bank, A. I. R. 1924 Cal. 552=51 Cal 43=79 I. C. 757. Wittenbaker v. J. C. Ganlortaun (1917) 44 Cal 917=43 I. C. 11.
4 Mackenzie Lyall & Co. v. Chamroo & Co. 16 Cal. 702.
5 Buttonsey Rowji v. Bombay United Spg. Mfg. Co. 41 Bom. 518.
6 Ibid.
7 Holderness v. Collinson (1827) 7 B. & C. 212, 31 R. R. 174.
8 Bilaram Paramsukhdas v. Gudiyatam Gobinda Chetty. A I R. 1925 Mad 1282=91 I C 257
9 Robinson v. Mollett, 1875) 7 H. L. 802.
10 Lachman Rai v. Akbar Khan, 1 All. 440; Gurdayal v. Jhandu 10 All. 585, Paul Bier v Chotalal, 30 Bom 1(15); Rahimatbai v Hirbai, 3 Bom 34; Gopal v. Hanmant, 3 Bom. 273(297).
11 Superunddhwaja v. Garuraddhwaja, 15 All. 147.
12 Syud Mohammad Afzal v. Kahhyalal, 5 W. R. 42
13 In re N. W Rubber Co. (1908) 2 K. B. 919; Ropner v. Sloate, 10 Com. cas. 73.
14 Attwood v. Sellar, 5 Q. B. D. 286.
15 Ibid.
16 Ibid.
17 Sivendson v. Wallace, 10 App. cas. 404.
18 The Steamship Co. v. Price, 8 Com. cas 292.

In *Smith* v. *Ludah*[1], Farren J. in discussing the admissibility of evidence (as to an usage in the Bombay piece goods trade) under Section 92, proviso, (5) Indian Evidence Act. cited a passage from *Hutton* v. *Warren*[2]:—

"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent......And this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to those known usages."

This evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument relating to the contract[3].

The usage must be binding on both parties to the contract

For the application of the rule stated above the usage must be binding on both the parties. If the usage is such that it is binding on one party only, as belonging to a particular class or community or locality to which the usage applies, and does not bind the other party to the contract because of his belonging to a class or community or locality different from that to which the usage applies, the rule contained in this section will not vary or negative any right, duty or liability arising under the contract by implication of law. For instance, there may be a usage which may be confined to mutual dealings of the merchants of a particular locality or market. Such usage is not binding on a merchant who does not belong to that locality or market and as such does not vary or negative the legal incidents of a contract of sale which a merchant belonging to such locality or market may enter into with one who does not so belong.[4] Where other conditions noted above as to validity and application are satisfied the fact that the area to which it extends is small[5], or that the class of person to which it applies is limited[6], or that it is only the usage of a particular trade[7]; or market[8] or business[9], or if such trade[10], or business[11], in a particular town or of a trade between two parts as to all commodities or as to one only[12], is immaterial.

Ceasure of usage.

A mercantile usage like any other usage may die out by the coming into existence of another inconsistent usage[13], but the mere fact that it is frequently excluded by inconsistent contracts does not show that it has become extinct.[14]

Reasonable time a question of fact

***63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.**

1 (1892) 17 Bom. 129.
2 (1836) 150 E. R. 517, 46 B. R. 368.
3 Leopold Walford v. Affreteurs Reunis S. A. (1918) 2 K. B. 498, C. A.; Holmes Wilson & Co. Ltd. v. Bata Kristo, A I. R. 1927 Cal. 668=(1927) 54 Cal. 549.
4 Daun v. City Brewery, L. R. 8 Eq. 161.
5 Norden Steamship Co. v. Dempsey. I C. P. D. 654; The Sheilla (1909), p. 31.
6 Temple v. Runnalls, 18 T. L. R. 822.
7 Syers v. Jones, 2 Ex. 117; Swancott v. Westgarth, 4 East, 75.
8 Pollock v. Stables, 17 L. J. Q. B. 352.
9 Cotton v. Sonnes, 18 T. L. R. 456.
10 Mollet v. Robinson, L. R. 7 H. L. 802.
11 Fleet v. Murton, 41 L. J. Q. B. 49.
12 Taylor v. Briggs, 2 C. & P. 525; Gould v. Oliver, 7 L. J. C. P. 68.
13 Moult v. Halliday, (1898) I. Q. B. 125.
14 Ropner v. Sloate, 92 L. T. 328.

*Section 56 of the English Sale of Goods Act, 1893—Appendix A.; Section 46—Explanation, of the Indian Contract Act, 1872.

This section relates to the import of the term "reasonable time" and is based on section 56 of the English Sale of Goods Act, 1893 (Appendix A). The same provision exists in the *Explanation* to section 46 of the Indian Contract Act, 1872. Before the passing of the English Sale of Goods Act the question of what is a reasonable time was regarded as a question of law and decided with reference to certain artificial rules. The English Act altered the law on the point and made it a question of fact[1].

References to remarkable time are made in sections 24, 36 (2), 42, 44 and 54 (2). Section 36 (4) makes the same provision as to what is a reasonable hour.

*64. In the case of a sale by auction—(1) Where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale; **Auction sale**

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his

(3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction;

(4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;

(5) the sale may be notified to be subject to a reserved or upset price;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

This section follows section 58 of the English Act though the arrangement of the different provisions has been altered. Sub-section (5) re-enacts the provisions of section 123 of the Indian Contract Act, 1872.

*Analogous law.
Section 58 of the English Sale of Goods Act, 1893—Appendix A, Sections 122 and 123 of the Indian Contract Act, 1872—Appendix B.

See Ramudu Iyer v. Ramayyar, A. I R. 1925 Mad. 221=78 I. C 1051; Empire Engineering Co v. Municipal Board, Bareilly, A. I R. 1929 All 901=119 I. C 853.

This section only deals with the rights and liabilities of the parties to the contract of sale. It has nothing to do with the rights and liabilities of the auctioneer either in relation to his principal or to the buyer.

Auction sales.

Sales by auction are according to Benjamin of three kinds[1]:—

1. Sale without reserve where the employment of a puffer renders the sale voidable.

2. Sale with a condition that the highest bidder shall be the purchaser, nothing being said about reserve.

3. Sale with a right expressly reserved to bid by or on behalf of the seller.

A sale subject to a reserve price and the reservation of a right to bid are distinct matters[1].

Sub-section (1)—each lot a separate contract.

The rule in this sub-section is similar to the provision in section 122 of the Indian Contract Act which is now repealed, though perhaps more guarded[2]. It provides that each lot shall be deemed to be sold under a separate contract. This is, however, only a *prima facie* rule, and therefore subject to a contrary intention.

"But the nature of the contract or its subject-matter or circumstances known to both seller and buyer may show that two or more sales at auction were intended by both to be interdependent[3].

A condition that the goods shall not be removed until payment does not prevent the buyer to whom a lot has been knocked down from re-selling the goods forthwith[3].

The mere fact that a man purchases several lots does not convert his purchases into a single contract[4].

Sub-section (2)—auction sale when complete.

The bid constitutes the offer in a contract of sale by auction. The acceptance of the bid by the auctioneer, when communicated by him by the fall of the hammer or in any other customary manner completes the sale. Being only an offer, a bid may be retracted at any time before it is accepted[5]. The old English Common Law rule was the same[6], and it was followed in British India before the Act[7].

1 Benjamin on Sale, 7th Edn., pp 497-498. As to essentials of an auction see Raja Bhupendra Narain v. Maharaj Bahadur, A. I. R. 1938 Cal, 54. See also Halsbury's Laws of England, Vol. XXIX, for, the meaning of 'sale by auction.'

2 Emmerson v. Heelis (1809) 2 Taunt, 38, 11 R. R. 520; Roots v. Lord Dormer (1832) 4 B. & Ad. 77, 38 R. R. 231. For an instance of the presumption being rebutted see Franklyn v. Lamond (1847) 4 C. B. 637, 72 R. R. 671.

3 (cf.) Holliday v. Lockwood (1917) 2 Ch. 47; Dykes v. Blake (1838) 132 E. R. 866; 44 R. R. 761.

4 Scott v. England (1844) 2 D. & L. 520; 69 R. R. 868.

5 McManus v. Fortescue (1907) 2 K. B. 1, C. A.; Payne v. Cave (1789) 3 T.R. 148, 1 R.R. 679: Indian Contract Act, section 5; Champa Lal v. Jai Gopal, A.I.R. 1922 Mad. 486.

6 Payne v. Cave, supra; Warlow v. Harrison (1858) 28 L.J.Q.B. 18, at p. 21; 117 R.R. 919, 923.

7 Agra Bank v. Hamlin (1890) 14 Mad. 235.

As the offer may be retracted before acceptance, so, conversely, it has been held that if a sale be advertised but lots are afterwards withdrawn, an intending bidder has no right of action[1]. Where, however, it turns out that the representation that the auctioneer was authorised to sell, was false and made fraudulently, the intending purchasers incurring expenses on the faith of such representation can sue the auctioneer in tort for the recovery of such expenses and for damages for the loss of time[2]. It is common to insert in conditions of sale a proviso that biddings shall not be retracted, but it seems that such a condition is inoperative in law, for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it even if he could be supposed to assent by attending the sale with notice of the conditions.[3].

Where a bid is accepted subject to the owner's sanction, the bid can still be withdrawn. Thus, when the bid of an agent at an auction sale was accepted by the auctioneers *kutchapucca* (subject to sanction of the owner of the goods) and the agent agreed thereto, it was held that this did not preclude the principals of the agent from exercising their right of retracting the bid before it was accepted by the auctioneers[4].

Where a bid is accepted by the auctioneer subject to the approval of the vendor, the contract becomes binding as soon as the vendor signifies his assent, and the mere fact that the actual bidder was only a benamidar for another person does not vitiate the sale.[5]

When the sale is announced to be subject to a reserve price, every bid and the acceptance by the auctioneer are subject to the reserve price having been reached[6].

Even if there is a condition that the goods shall be taken away and paid for within a given time, and upon failure of the buyer to comply with that condition they shall be re-sold, the buyer may still be sued for the price, and cannot claim that the goods must be re-sold and the difference between the contract price and the re-sale price alone be charged against him[7].

Authority of auctioneer.

An auctioneer who sells goods which he has no right to sell may or may not be guilty of conversion, according to the circumstances[8]. As a rule, he would be liable to the true owner for conversion, or to the owner's assignee for value, even though he had no notice of the assignment[9].

An auctioneer has implied authority to sign a contract on

1 Harris v. Nickerson (1873), L.R. 8 Q.B. 286.
2 Richardson v. Silvester, L.R. 9 Q.B. 34.
3 See Freer v. Rimner (1844) 14 Sim. 391; 60 R.R. 617.
4 Mackenzie v. Chamroo (1889) 16 Cal. 702.
5 Chitibabu v. Garmalla, 29 I.C. 12.
6 McManus v. Fortescue, supra.
7 Robinson, Fisher & Harding v. Behar (1927) 1 K.B 513. cf. section 54 notes thereunder.
8 Consolidated Co. v. Curtis & Son (1892) 1 Q.B. 495, 498; Barker v. Furlong, (1891) 2 Ch. 172.
9 Consolidated Co. v. Curtis, supra.

behalf of both buyer and seller[1], an authority which does not, however, extend to his clerk[2].

The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction[3].

Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, even though the auctioneer be offered a price in excess of the reserve[4]. An auctioneer has no implied authority to give a warranty on behalf of the seller[5]: nor has he implied authority to rescind a contract of sale made by him[6]. Similarly, he has no implied authority to deliver goods sold except on payment of the price, or to allow the buyer to set off a debt due to him from the seller[7].

An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him[8]; but he may take a cheque in payment of the deposit according to the usual custom[9].

Rights and liabilities of the auctioneer.

An auctioneer is a particlar agent employed to sell property of the vendor. He acts in a two-fold capacity. Till the fall of the hammer. he is an agent for the seller but when the sale is complete, he becomes an agent of the buyer and has thus an authority to sign a contract on behalf of both the vendor and the purchaser[10]. The auctioneer may sell the goods and sue for the price in his own name and the position is not altered by the fact that the sale takes place on the owner's premises or his name is disclosed at the time of the sale[11], and can maintain an action for wrongful interference with them or damage to them. He has a lien upon the goods as well as on the proceeds of the sale for his charges and advances and he, therefore, does not lose the right to sue for the price by allowing the buyer to remove the goods before payment[12]. The buyer therefore cannot set off against him any debt due to the buyer from the owner except in so far as the amount sought to be set off exceeds the auctioneer's interest[13]. This usually represents the auctioneer's charges and expenses, but by special agreement between the owner

1 Emmerson v. Heelis (1809) 2 Taunt, 38, 11 R.R. 590; White v. Proctor (1811) 4 Taunt. 209, 13 R.R. 580. But see Bartlett v. Purnell (1836) 4 A. & E. 792, 43 R.R. 484.

2 Bell v. Balls (1897) 1 Ch. 663; Cf. Sims v. Landray (1894) 1 Ch. 818.

3 Mews v. Carr (1856) 1 H. & N. 484, 108 R.R. 688.

4 Daniel v. Adams (1764) Ambl. 495; Marsh v. Jelf. (1862) 3 F. & F. 234, 130 R.R. 886.

5 Payne v. Leconfield (1882) L. J. Q. B. 642.

6 Nelson v. Aldridge (1818) 2 Stark, 435, 20 R. R. 709.

7 Brown v. Staton (1816) 2 Chit. 353, 23 R. R. 750.

8 Williams v. Evans (1866) L. R. 1 Q. B. 352.

9 Farrer v. Lacey (1885) 31 Ch. Div. 42.

10 Emmerson v. Heelis, supra; White v. Proctor, supra.

11 Willims v. Millington (1788) 1 Hy. Bl. 81, 2 R. R. 724; Manley & Sons, Ltd. v. Berkott (1912) 2 K. B. 329, 333; cf. Freeman v. Farrow (1886) 2 T. L. R. 547, where the auctioneer was held entitled to sue for the price of the goods sold on his premises though the owner himself effected the sale.

12 See Kharas v. Bawanji, A. I. R. 1926 Sind 6= 92 I. C. 894; Webb v. Smith (1885) 30 Ch. D. 1923.

13 Manley & Sons Ltd. v. Berkett, supra; Holmes v. Tutton (1855) 5 E. & B. 65, 103 R. R. 367.

and the auctioneer it may be increased to cover other debts due from the owner to the auctioneer and also an obligation incurred by the auctioneer to pay other creditors of the owner in pursuance of an agreement to which the owner, auctioneer and those creditors are parties[1]. For same reason, the buyer cannot plead payment to the owner in answer to an action for the price by the auctioneer[2]. Even an express agreement between the owner and the buyer that the latter may set off the price of the goods bought against a debt due to him from the owner will not affect the auctioneer's position unless he has notice of and assents to it[3], though if, and in so far as. the auctioneer's interest is satisfied, such an agreement may be pleaded as a defence to an action by the auctioneer[4]. Of course, the auctioneer may be assenting, either expressly or impliedly, to such an agreement, waive his own rights[5].

It may be observed that an auctioneer may like any other agent, by not disclosing the fact that he is an agent, render himself liable to be treated as a principal by the buyer, and in such a case his position will be that of a seller of the goods. Such cases, however, are rare and usually it is known that he is an agent, though his principal may not be disclosed.

It is not open to an auctioneer to delegate his authority, though he may employ others where the work is of a merely mechanical character and is done under his direction[6]. On the sale of specific goods, where he discloses the fact of agency, though he does not disclose the name of his principal[7] he gives no implied warranty of the vendor's right to sell

The auctioneer is entitled to indemnity from his employer for the consequences of acting on his authority and he can claim reimbursement in respect of damages recovered against him by the true owner of goods[8].

The liabilities of the auctioneer

There is thus created a sort of contract between the auctioneer and the buyer, though it does not amount to a contract of sale in the full sense of the term, but a contract made with the auctioneer on his own account with the buyer. The auctioneer no doubt warrants his authority to sell on behalf of his principal[9], and also, that he knows of no defect in his principal's title[10], and probably, even apart from express agreement, he undertakes to give the purchaser possession of the goods on payment of the price into his hands and that such possession shall not be disturbed by his principal or himself.[11]

In *Ranibow* v. *Hawkins*[8] it was held that an auctioneer has ostensible authority to sell without reserve, and if, after the

1 Manley & Sons Ltd. v Berkett; supra.
2 Robinson v Rutter (1855) 4 E & B. 954, 99 R R 849
3 Manley & Son. Ltd v Berkett, supra.
4 Grice v. Kendrick (1870) L R 5 Q B. 340
5 See Pollock & Mulla, Sale of Goods Act, page 346.
6 Coles v. Trecothick, (1804) 7 R. R 167. 32 R. R 592.
7 Benton v. Campbell Parker & Co. (1925) 2 K. B. 410
8 Adamson v. Jarvis (1827) 130 E.R. 693; 29 R R 503; Halbrown v. International Horse Agency (1903) 1 K. B. 270.
9 Anderson v. Croall & Sons. Ltd. (1904) 6 F. 153 (Court of Session) in which case the auctioneer purported to sell goods which the owner had not authorised him to sell; Benton v. Campbell Parker & Co., (1925) 2 K. B. 410, 415.
10 Benton v. Campbell Parker & Co., supra.
11 Ibid, p. 416.
12 (1904) 2 K. B. 322.

acceptance of a bid, the seller sets up a restriction of the auctioneer's authority not disclosed to the buyer, the latter's remedy is against the seller on the contract of sale, and not against the auctioneer. This decision has been criticised in the later case of *Mc Manus* v. *Fortescue*[1] which laid down that an auctioneer is a special agent, and has no ostensible authority to sell without reserve.

An auctioneer may therefore be liable to the buyer if he fails to deliver or put the buyer in possession of the goods[2], but if he does so he has completed his contract; and it would seem that he does not warrant his principal's title to the goods[3].

If, however, before the price is paid, the true owner of the goods claims them from the buyer, the auctioneer cannot recover the price, even if the buyer has taken the goods away under an express promise to pay for them[4], and presumably if the price, or any part of it, has been paid to the auctioneer and the money still remains in his hands, the buyer may recover it from him in an action for money had and received[5].

If the buyer avoids a sale by reason of any contravention of the provisions of sub-sections (3) and (4) he may resist an action for the price by the auctioneer, and also recover the deposit from him. if the auctioneer has been a party to the fraud, with interest[6].

If the auctioneer does not disclose his principal and the sale is not announced as being subject to a reserved price, does he warrant that he has authority to sell without reserve? It seems possible though the point is not free from doubt[7].

As already stated, if an auctioneer sells goods which in fact belong to third person without that person's authority he may be guilty of conversion, and is so guilty if he delivers the goods with interest to pass the property in them to the buyer[8]. But when he merely negotiates a sale and earns a commission, he it not guilty of conversion.[9]

An auctioneer will be entitled to an indemnity from the person who employed him to sell the goods under the provisions of section 223 of the Indian Contract Act.

Sub-section (3)—right to recover a bid by or on behalf of the seller.

This sub-section states that in the case of a sale by auction, a right to bid may be reserved expressly by or on behalf of the seller

1 (1907) 2 K. B. 1, C. A.

2 Franklyn v. Lamond (1847) 4 C.B. 637; Woolfe v. Horne (1877) 2 Q. B. D. 355; Rainbow v. Hawkins, supra.

3 Wood v. Baxter (1883) 49 L. T. 45; Salter v. Woollams (1841) 2 Man. & G. 650, 58 R. R. 518; Payne v. Elsden (1900) 17 T. L. R. 161; Benton v. Campbell Parker & C., supra.

4 Dickenson v. Naul (1833) 4 B. & Ad. 638, 72 R. R. 671.

5 Pollock & Mulla, Sale of Goods Act, p. 348.

6 Thornett v. Haines (1846) 15 M. & W. 367, 71 R.R 715; Heatley v. Newton (1881) 19 Ch. Div. 326, C.A.

7 See Warlow v. Harrison (1859) 1 E. and E. 295, 309. But see the comments on this case in Wainprice v. Westley (1865) 6 B. & S. 420, 141 R.R 452; see also Pollock and Mulla, Sale of Goods Act, page 348.

8 Consolidated Co. v, Curtis, supra.

9 National Mercantile Bank v. Rymill (1881) 44 L. T. 767, C.A.; Cochrane v. Rymill (1879) 40 L.T. 744, 746, C.A.

and, where such right is expressly so reserved, but not otherwise, the seller or *any one person* on his behalf may, subject to the provisions contained in the section, bid at the auction. The sub-section corresponds to section 58 (4) of the English Act. The words "one person" would imply that the seller cannot employ more than one agent to bid for him. Thus, where both the auctioneer and puffer bid on behalf of the seller the sale was held to be voidable[1], but neither the seller nor his agent is restricted to one bid[2]. "All the cases, both at law and in equity, agree in this, that if more persons than one are employed to bid, that amounts to fraud, as only one is necessary to protect the property, and the employment of more can only be to enhance the price, and therefore renders the sale void[3]."

The seller is not responsible if others, who are interested in the sale, make fictitious bids without his privity.[4]

The mere reservation of a price does not justify the seller in employing a bidder.[5] It would appear that the reservation of a right to bid entitles the seller to withdraw the goods from the auction because the reserve price has not been reached, in fact though there is no notification in the conditions of sale of there being a reserve price[6].

Sub-section (4)—remady of the buyer if seller bids improperly.

Where the sale is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated at the option of the buyer as fraudulent[7].

This sub-section corresponds to sub-section (3) of section 58 of the English Act. Formerly in England it seems to have been the rule in equity that, when a sale by auction was not expressly stated to be without reserve, the seller might employ one person to bid, so as to prevent the property going at an undervalue. The Sales of Land by Auction Act, 1867 (30 & 31 Vict. C. 48), commonly called the Puffer's Act, was passed to abolish this rule, as applicable to the sale of land, and the same rule has now been made applicable to sale of goods.

It may be noted that a sale contravening the rule laid down in the sub-section is not void, but being a fraud on the buyer, the buyer is entitled to avoid it under section 19 of the Indian Contract Act. The buyer can alternately sue the seller for the tort.

Mortimer v. Bell (1865) L.R. 1 Ch. App. 10; 148 R.R. 26.
Halsbury Laws of England 2nd Edn. Vol. XXIX, 1st Edition; Vol. XXV, p. 280 f. n. (m).
Thornett v. Haines (1846) 15 M. and W. 367, at p. 372.
Union Bank v. Munster (1887) 37 Ch. D. 51 (mortgagor making fictitious bids without the privity of the mortgagee, who was the seller.)
5 Gilliat v. Gilliat (1869) L.R. 9 Eq. 60.
6 Fenwick v. Macdonald. supra.
7 Per Lord Mansfield in Baxwell v. Christiecrop, 15 M. & W. 367.

"Knock outs."

It has been held that a combination of bidders, not to bid against each other, commonly known as a knock-out, is not illegal.[1] The mere act of dissuading purchasers is not a fraudulent act[2], but if the purchaser manages to get the thing himself by fraudulently dissuading others from bidding, the vendor may avoid the sale[3]. The seller can protect himself against a "knock-out" by fixing a reserve price[4].

In England the position has been modified by the Auctions (Bidding Agreements) Act, 1927, (17 & 18 Geo. 5 C. 12).

Sub-section (5).

This sub-section corresponds to the first clause of section 58 (4) of the English Act. The term "upset price" is the Scottish equivalent of "reserved price." The reservation of price must be express.

Sub-section (6).

It was the rule at common law that if the seller bid, or employed others to bid for him, without reserving the right to bid, the buyer could avoid the sale.[5] The present sub-section embodies the common law rule and is in substance the same as section 123 of the Indian Contract Act. There is no separate provision corresponding to sub-section (6) in the English Act, but the wording of section 58 (3) of the Act is wide enough to cover the case of pretended biddings on behalf of the seller.

Notification of auction sale.

All the conditions of the auction sale should be notified before the bids commence and all such conditions are deemed to have been sufficiently communicated to bidders if they are exhibited legibly in the auction room[6]. Where the sale is to be held subject to the seller's rights to bid or to employ persons to bid on his behalf or when the seller reserves the right of confirmation or approval of the final bid, the fact must be notified before the sale commences[7]. Unless such notification is made it is illegal for the seller or any one on his behalf to make a bid,[8] or for the auctioneer knowingly to take such bid, and as against a purchaser the sale, if so held, will be treated as fraudulent and invalid.[9] Where the seller reserves a right to bid, he or any one person, and no more, may bid at the auction,[10] and the conditions announced in the notification as governing his right must be strictly

1 Rawlings v. General Trading Co. (1921) 1 K. B 635, C. A.; Jyoti v. Jhowmull (1909) 36 Cal 184, 1 I. C. 784: Hari v. Naro (1893) 18 Bom. 342; Doorga Singh v. Sheo Pershad Singh (1889) 16 Cal 194: Mahomed Meera Rewuthar v. Savvasi Vijaya Gopalai (1899) 27 I. A. 17; cf. Ma E Mya v. U. Pe Lay (1925) 3 Rang 281, 90 I. C. 958, A. I. R. 1926 Rang 65

2 Doorga v. Sheo Prasad (1889) 16 Cal. 194.

3 Fuller v. Abrahams (1821) 129 E. R. 1226; 23 R. R. 626.

4 Rawlings v. General Trading Co., supra.

5 Thornett v. Haines (1846) 15 M. & W. 367, 71 R. R. 714, (recovery of deposit); Green v Baverstock (1863) 14 C B. N. S 204. 135 R R. 657.

6 Mesnard v. Aldridge. Esp 271: Bywater v. Richardson 1 Ad & E. 508; Freme v. Wright Madd. 364: Hals. Vol. I. p. 509.

7 Hals. Vol. I. Art. 1035; Sub-section (4) of Section 64.

8 Parnell v. Tayler, 2 L. J. Ch. 195.

9 Hals. Vol. I, pp. 508—509.

10 Ibid.

complied with.[1] So where a seller reserved a right to bid once only, but bid three times when the actual bids were taken the sale was set aside as invalid on that ground[2]. Fictitious bids by a third person without the knowledge or privity of the seller or the auctioneer, however, do not invalidate the sale, nor do they effect the seller's right to seek specific performance.[3] But if two or more persons take part in a mock-auction by means of sham bidders and bidding to induce persons to buy at excessive prices they are guilty of a criminal conspiracy.[4]

Damping the sale.

As in the case of the seller or auctioneer, improper or fraudlent acts, which go to raise the price, invalidate the sale as fraudulent, so, in the case of the purchasers, improper or fraudulent acts, which are likely to prevent the property put up for sale from realising its fair value, and to 'damp' the sale as the process is technically called, invalidate any purchase by persons guilty of or privy to such acts, and will justify the auctioneer in withdrawing the property.[5] 'Damping', however, should be carefully distinguished from 'knock out' i. e., an agreement not to bid against each other, which is quite legal. The former consists in the illicit or overt acts of desuading the would-be purchasers from bidding or from raising the price as by pointing out defects or by doing some other act which prevent persons from forming a proper estimate of the price of the goods or by scaring them away by some other device, while the latter is an agreement between two or more persons not to bid against each other in an auction.[6] While the former is illegal entitling the auctioneer even to withdraw the property from auction, the latter has been held to be quite justified by law.[7]

Transfer of the property.

As already noted, on the fall of the hammer, the offer is accepted and the goods (if specific) become the property of the buyer[8]. This is so even if there is a condition of sale that they are not to be removed before payment, and such a condition does not prevent the buyer, to whom a lot has been knocked down, from re-selling the goods forthwith[9]. And even if there is a condition that the goods shall be taken away and paid for within a given time, and upon the failure of the buyer to comply with that condition they shall be re-sold, the buyer may still be sued for the price, and cannot claim that the goods must be resold, and the difference between the contract price and the re-sale price alone be charged against him[10].

This rule, however, that the contract is completed by the fall of the hammer is subject to the provisions

1 Parfitt v. Jepson, 46 L J. C. P.
2 Ibid
3 Union Bank v Munster, 37 Ch. D 51
4 Reg v Lewis, 11 Com. C. 404.
5 Twining v. Maurice 2 Bro C C 326. Mason v. Armitage 13 Ves. 25, Fuller v. Abrahams, 6 Moo. C.P. 816.
6 See Hals. Vol. 1, Art, 1042.
7 Ibid. See also Doolubhdas v. Ramlal, 15 Jur. 257; Galton v. Emuss 13 L.J. Ch. 388; Re Carew's Estate Act, 28 L J. Ch. 218; Heffer v. Martyn, 36 L J. Ch. 372.
8 See Sweeting v Turner (1871) L R 7 Q. B 310: Shankland v Robinson & Co (1920) S. C (H. L.) 103 cf. Saint v Pilley (1875) L.R. 10 Ex 137 (fixtures)
9 Scott v. England (1844) 2 D. & L. 520, 69 R. R 868.
10 Robinson, Fisher & Harding v. Behar (1927) 1 K. B. 518 Cf. Section 54 and notes thereunder.

of sub-section (5). Where a sale is notified to be subject to a reserved price, the bidding and acceptance of a bid are subject to the condition that the reserved price has been reached. If the goods are knocked down to a bidder at a price below the reserved price, there is no enforceable contract, for a conditional acceptance of a conditional offer cannot amount to a binding contract.[1]"

It may be observed that in England owing to the Statute of Frauds, where the value of the goods sold exceeds £10, there must, in order that the contract may be enforceable against the seller and buyer respectively, be a memorandum of it signed by the seller and buyer, or their agent, and the auctioneer, in the case of a sale by auction, has the implied authority of both seller and buyer to sign the memorandum. In India, however, apart from any express conditions, this is not necessary and the contract is enforceable against both as the buyer's offer is accepted.[2]

In contract of sale amount of increased or decresed duty to be added or deducted

*64 A. In the event of any duty of customs or excise on any goods being imposed, incresaed, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time :—

(a) If such imposition or increase so takes effect that the duty or increased duty, as the case may be or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(b) If such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty and he shall not be liable to pay, or be sued for or in respect of, such deduction."

Statement of objects and reasons.

"The attention of the Government of India has been drawn to a recent judgement of the Lahore High Court in a civil revision case in which it was held that since the wording of the Preamble of the Indian Tariff Act, 1934 (XXXII of 1934), refers only to customs duties on goods imported into or exported from British India, section 10 of that Act, which permits the addition to or deduction from a

1. Mannu v. Portescue (1907) 2 K. B. 1.

2. See Pollock & Mulla, Sale of Goods Act, pages 842 and 843.

*Added by the Indian Sale of Goods (Amendment) Act, 1940, S. 2.

contract price of an increase or decrease in duy imposed after the making of the contract does not apply to the excise duty on sugar produced in British India and intended to be sold within the country for home consumption. In order to put the matter beyond doubt and since the subject is germane to the law relating to the sale of goods and contract of sale, it is proposed to repeal this section of the Indian Tariff Act and re-enact it as a section of the Indian Sale of Goods Act. 1930."

65. Chapter VII of the Indian Contract Act, 1872, is hereby repealed. Repeal

This section repeals the whole of chapter VII of the Indian Contract Act. Illustrations to the provisions of the present Act have not been given so that the courts are left to construe the sections as they stand.

Rules of construction are explained on pages 4 to 6 and may be referred to.

*66. (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect:— Savings

(a) Any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

This section contains several saving clauses. Section 3 of the Act is also in the nature of a saving clause and might very well have been incorporated in this section instead of being enacted as a separate section. Sub-sections (2) and (3) are based on sub-sections (1) and (4) respectively of the English Act.

*Analogous law.
Sections 60 and 61 of the English Sale of Goods Act, 1893.

Sub-section (1)

Clauses (*a*) to (*c*) of sub-section (1) save all rights and liabilities which arose before the Act came into force, all proceedings taken in connection with such rights and liabilities and all transactions made before the Act. The Act is thus not retrospective. And even without such express provisions, an Act is not construed as retrospective unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction[1].

Clause (*d*) saves enactments relating to the same subject as this Act, such as the Indian Merchant Shipping Act, 1923, and the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods.

Cluse (*e*) really provides for the contingency of a *lacunae* in the Act.

Sub-section (2).

Sub-section (2) saves the provisions of the law of insolvency relating to contract for the sale of goods. The Acts now in force in British India relating to Insolvency are the Presidency Towns Insolvency Act (III of 1909); the Provincial Insolvency Act (V of 1920); the Companies Act, Part V and see also Order 22. R. 8, of the Code of Civil Procedure, 1908.

Sub-section (3).

Sub-section (3) declares that the Act does not apply to ostensible sales, or transactions which, though they have the outward semblance of contracts of sale, are in substance transactions of mortgage, pledge or other security These are dealt with by the Transfer of Property Act and sections 172—179 of the Indian Contract Act.

A mortgage of goods must be distinguished from the sale with a condition for resale to the original seller[2]. A pledge is a bailment of goods as security for payment of a debt or performance of a promise[3].

1 Lauri v. Renad (1892) 3 Ch. 402, 421, C. A.
2 Beckett v. Tower Assets Co. (1891) 1 Q. B. 1 at p. 25.
3 Section 172 of the Indian Contract Act.

APPENDIX A

THE SALE OF GOODS ACT, 1893

(56 & 57 Vict. c. 71)

An Act for codifying the Law relating to the Sale of goods.

(20th February, 1894.)

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.—Formation of the Contract.

Contract of Sale.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be contract of sale between one part owner and another. **Sale and agreement to sell.**

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. **Capacity to buy and sell.**

Porvided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor, or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. **Contract of sale how made.**

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale for ten pounds and upwards.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the sale fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject matter of Contract.

Existing or future goods.

5,—(1) The goods which form the subject of a contract of a sale may be either existing goods owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale tne seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods which have perished.

6. Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Goods perishing before sale but after agreement to sell.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

Ascertainment of price.

8.—(1). The price in a contract of sale may be fixed by the conract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation.

9.—(1). Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party,

and such third party cannot or does not make such valuation, the agreement is avoided : provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages aganist the party in fault.

Conditions and Warranties.

10.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the tems of the contract. **Stipulations as to time.**

(2) In a contract of sale "month" means *prima facie* calendar month.

11.—(1) In England or Ireland— **When condition to be treated as warranty.**

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition. or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a conditioh, though called a warranty in the contract :

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertaking as to title, etc.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is--

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(3) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Sale by description.

13. When there is a contract for the sale of goods by description, there is an implied condition that the goods shall corresponds with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

Implied conditions as to quality or fitness.

14. Subject to the provisions of this Act and of any statute in that behalf, there is not implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality of fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

Sale by sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality.

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II. Effects of the Contract.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. **Goods must be ascertained.**

17.—(1) Where that is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. **Property passes when intended to pass.**

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to the buyer. **Rules for ascertaining intention.**

Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passess to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or on "sale or return' or other similar term the property therein passes to the buyer:—

(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5 —(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods these upon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriarion is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reseve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Reservation of right of disposal.

19. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such cases, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Risk *prima facie* passes with property

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the othere party.

Transfer of Title.

Sale by person not the owner.

21—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell then under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(*a*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b*) The validity of any contract of sale under any special common law or stautory power of sale, or under the order of a court of competent jurisdiction.

Market overt.

22. (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to sale of horses.

(3) The provisions of this section do not apply to Scotland.

Sale under voidable title.

23. When the seller of goods has voidable title thereof but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Revesting of property in stolen goods on conviction of offender.

24. Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

Seller or buyer in possession after sale.

25 (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy any goods obtains with the consent of the seller, possession of goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were mercantile agent in possession of the goods or documents of title with the contract of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

Effect of writs of execution.

26. (1) A writ of *fieri-facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to

be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person has at the time when he acquired his title notice that such writ or any other writ by virtne of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any office charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.—Performance of the Contract.

Duties of seller and buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Payment and delivery are concurrent conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say; the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Rules as to delivery.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable houre. What is a reasonable hour is a question of fact.

(5) Unless otherwies agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity.

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.--(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. **Instalment deliveries.**

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer. **Delivery to carrier.**

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit. **Risk where goods are delivered at distant place.**

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining **Buyer's right of examining the goods.**

them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Acceptance.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Buyer not bound to return rejected goods.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of buyer for neglecting or refusing delivery of goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time, after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the negelct or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.—Rights of Unpaid Seller Against the Goods.

Unpaid seller defined.

38. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.

Unpaid seller's right.

39. (1) Subject to the provisions of this Act and of any statute in that behalf notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) A lien on the goods (or right to retain them) for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;

(*c*) A right of re-sale as limited by this Act,

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

Attachment by seller in Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding and such arrestment or poinding shall have the same operation and, effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

Seller's Lien.

41. (1) Subject to the provisions of the Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(*a*) Where the goods have been sold without any stipulation as to credit ;

(*b*) Where the goods have been sold on credit, but the term of credit has expired ;

(*c*) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Part delivery.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Termination of lien.

43. (1) The unpaid seller of goods loses his lien or right of retention thereon —

(*a*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(*b*) When the buyer or his agent lawfully obtains possession of the goods ;

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

Right of stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Duration of transit.

45. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water or other bailee or custodier for the purpose of transmission to the buyer, until

the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for this buyer, or his agent, the transit is at an end, and, it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage in transitu is effected.

46. (1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual must be given at such time and under such cirumstances that the principal, by the exercise reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer and Seller.

Effect of sub-sale or pledge by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has as sented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such

last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transitu. **Sale not generally rescinded by lien or stoppage in transitu.**

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not withhin a reasonable time pay or tender the price, the unpaid seller may re sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V. Actions for breach of the Contract.

Remedies of the Seller.

49. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods. **Action for price.**

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongully neglects or refuses to pay such price, the seller may maintain an action for the price although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. **Damages for non-acceptance.**

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance then at the time of the refusal to accept.

Remedies of the Buyer.

Damages for non-delivery

51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Specific performance.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for breach of warranty.

53. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may,

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or
(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of event, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the vaule they would have had if they answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of waranty if he has suffered further damages.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

Interest and special damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI. Supplementary.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. **Exclusion of implied terms and conditions.**

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact. **Reasonable time a question of fact.**

57. Where right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action. **Rights, etc. enforceable by action.**

58. In the case of a sale by auction **Auction Sales.**

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof. **Payment into court in Scotland when breach of warranty alleged**

60. The enactment mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. **Repeal**

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest.

61. (1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained. **Savings.**

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal

and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the rule of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in this form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Interpretation of terms.

62. (1) In this Act unless the context or subject matter otherwise requires.—

"Action" includes counterclaim and set off, and in Scotland condescendence and claim and compensation :

"Bailee" in Scotland includes custodier:

"Buyer" means a person who buys or agrees to buy goods:

"Contract of Sale" includes an agreement to sell as well as sale :

"Defendant" includes in Scotland defender, respondent, and claimant in a multiple poinding:

"Delivery" means voluntary transfer of possession from one person to another :

"Document of title to goods" has the same meaning as it has in the Factors Act :

"Factors Acts" means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same :

"Fault" means wrongful act or default:

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale :

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the Contract of sale :

"Lien" in Scotland includes right of retention :

"Plaintiff" includes pursuer, complainer, claimant in a multiple poinding and defendant or defender counterclaiming :

"Property" means the general property in goods, and not merely a special property :

"Quality of goods" includes their state or condition :

"Sale" includes a bargain and sale as well as a sale and delivery :

"Seller" means a person who sells or agrees to sell goods:

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made :

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of

sale, but collateral to the main purpose of such contract, the breach of which gives rise to claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts are they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them

63 This Act shall come into operation on the first day of January, One thousand eight hundred and ninety four. **Commencement.**

64. This Act may be cited as the Sale of goods Act, 1893. **Short title**

SCHEDULE.

This Schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee

Enactments Repealed (Section 60)

Session and Chapter	Title of Act and Extent of Repeal
1 Jac 1, c 21	An Act against brokers The whole Act
29 Chas 2, c 3	An Act for the prevention of frauds and perjuries In part, that is to say, sections fifteen and sixteen.*
9 Geo 4, c 14	An act for rendering a written memo necessary to the validity of certain premises and engagements In part, that is to say, section 7
18 & 20 Vict c 60	The mercantile Law Amendment (Scotland) Act, 1856 In part, that is to say, sections one, two, three, four, and five
19 & 20 Vict c 97	The Mercantile Law A mendment Act, 1856. In part, that is to say, sections one and two

* Commonly cited as sections sixteen and seventeen.

APPENDIX B

THE INDIAN CONTRACT ACT, 1872

CHAPTER VII.—Sale of Goods

Where property in goods sold passes.

76. In this chapter, the word "goods" means and includes every kind of moveable property. **Goods defined.**

Sale "defined".

77. "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

Sale how effected.

78. Sale is effected by offer and acceptance of ascertained goods for a price, or of price for ascertained goods, together with payment of the price or delivery of the goods; or with tender, part-payment, earnest or partdelivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.—(*a*) B. offers to buy A's horse for 500 rupees. A accepts B's offer, and delivers the horse to B. The horse becomes B's property on delivery.

(*b*) A sends goods to B, with that request that he will buy them at a stated price if he approves of them or return them, if he does not approve of them. B retains the goods and informs A that he approves of them. The goods become B's when B retains them.

(*c*) B offers A for his horse 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is accepted.

(*d*) B offers A for his horse 1,000 rupees on a month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted.

(*e*) B, on the first January, offers to A for a quantity of rice 2,000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.

Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.

79. Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made or finished.

Illustration.—B. orders A, barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.

Completian of sale of goods which the seller is to put into state in which buyer is to take them.

80. Where by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Illustration.—A, a ship-builder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up and delivered.

81. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price the sale is not complete until this has been done. **Completion of sale of goods when seller has to do anything thereto in order to ascertain price.**

Illustration.—(*a*) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupes per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B; the ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.

(*b*) A contracts to sell a heap of clay to B at a certain price per ton. B is, by the contract, to load the clay in his own carts and to weigh each load at a certain weighing machine which his carts must pass on their way from A's ground to B's place of deposit. Here nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

82. Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained. **Completion of sale when goods are unascertained at date of contract.**

Illustration.—A agrees to sell to B 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B.

83. Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is completed. **Ascertainment of goods by subsequent appropriation.**

Illustration—A, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract A fills 20 hogsheads with the sugar, and gives notice to B that the hogsheads are ready, and requires him to take them away. B says he will take them as soon as he can. By this appropriation by A, and assent by B, the sugar becomes the property of B.

84. Where the goods are not ascertained at the time of making the contract of sale, and by the terms of the contract the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so the goods are ascertained. **Ascertainment of goods by seller's selection.**

Illustration.—B agrees with A to purchase of him, at a stated price to be paid on a fixed day, 50 maunds of rice, out of a large quantity in A's granary. It is agreed that N shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks. The goods have been ascertained.

Transfer of ownership of moveable property, when sold together with immoveable.

85. Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

Illustration.—A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B.

Buyer to bear loss after goods have become his property.

86. When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

Illustrations.—(*a*) B offers, and A accepts, 100 rupees for a stack of firewood standing on A's premises, the firewood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment and while the firewood is on A's premises, it is accidentally destroyed by fire. B must bear the loss.

(*b*) A bids 1,000 rupees for a picture at a sale by auction. After the bid it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, on A.

Transfer of ownership of goods agreed to be sold while non-existent.

87. When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract by the seller, or by the buyer with the seller's assent.

Illustrations.—(*a*) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership for the indigo vests in B from the date of the acknowledgment.

(*b*) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this contract B, with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B.

(*c*) A, for a stated price, contracts that N may take and sell any crops that shall be grown on his land in succession to the crop then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.

88. A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time he has no reasonable expectation of acquiring them otherwise than by purchase.

Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract.

Illustration.—A contracts on the first January, to sell 50 shares in the East India Railway Company, to be delivered and paid for on the first March of the same year. A, at the time of making the contract, is not in possession of any shares. The contract is valid.

89. Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

Determination of price not fixed by contract.

Illustration.—B, living at Patna, orders of A, a coach builder of Calcutta a carriage of a description Nothing is said by either as to the price. The order having been executed, and the price being in dispute beween the buyer and the seller, the Court must decide what price it considers reasonable.

Delivery.

90. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer or of any person authorized to hold them on his behalf.

Delivery how made.

Illustrations. – (*a*) A sells to B a horse, and causes or permits it to be removed from A's stables to B's. The removal to B's stable is a delivery.

(*b*) B, in England. orders 100 bales of cotton from A, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting of the cotton on board the ship is a delivery to B

(*c*) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown, in order that he may get the goods. This is a delivery.

(*d*) A sells to B five specific casks of oil The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse rent for them from C. This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods as warehouseman of C.

(*e*) A sells to B 50 maunds of rice in the possession of C, a warehouseman. A gives B an order to C to transfer the rice to C, and C assents to such order, and transfers the price in his books to B. This is a delivery.

(*f*) A agrees to sell to B five tons of oil, at 1,000 rupees per ton, to be paid for at the time of delivery. A gives to C a wharfinger, at whose wharf he had twenty tons of the oil, and orders to transfer five of them into the name of B. C makes the transfer in his books and give A's clerk a notice of the transfer for B. A's clerk takes the transfer notice to B and offers to give it him on payment of the price of the oil. B refuses to pay. There has been no delivery to B, as B never assented to make C his agent to hold for him the five tons selected by A.

Effect of delivery to wharfinger or carrier

91. A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe cutody or delivery of the goods.

Illustration.—B, at Agra, orders A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B in a suit for the price.

Effect of part delivery.

92. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of tho goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Illustrations.—(*a*) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it and delivers over part of the goods to A in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property in the cargo.

(*b*) A sells to B a stack of firewood, to be paid for by B on delivery. After the sale, B, applies for and obtains from A leave to take away some of the firewood. This has not the legal effect of delivery of the whole.

(*c*) A sells 50 maunds of rice to B. The rice remains in A's ware house. After the sale, B sells to C 10 maunds of the rice, and A at B's desire sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

seller not bound to deliver until buyer applies for delivery.

93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Place of delivery.

94. In the absence of any special promise as to delivery goods sold are to be delivered at the place at which they are at time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not in existence at the place at which they are produced.

Seller's Lien.

Seller's lien.

95. Unless a contrary intention appears by the contract, a seller has a lien on sold goods as they remained in his possession and the price or any part of it remains unpaid.

Lien where payment to be made at a future day, but no time fixed for delivery.

96. Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price.

Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

Illustration.— A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price.

97. Where by the contract, the payment is to be made at a future day, and the buyer allows to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.

Illustration.— A selles to B a quantity of sugar in A's warehouse. It is agreed that three manths' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of the three months, and then does not pay for them. A may retain the goods for the price.

98. A seller in possession of goods sold, may retain them for the price aginst any subsequent buyer, unless the seller has recognized the title of the subsequent buyer.

Seller's lien against subseqent buyer.

Stoppage in Transit.

99. A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

Power of seller to stop in transit.

100. Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer and are not yet come into the possession of the buyer or any person on behalf, otherwise than as being in possession of the carrier, or as being so lodged.

When goods are to be deemed in transit.

Illustrations.—(*a*) B, living at Madras, orders goods of A, at Patna. and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C, are in transit.

(*b*) B, at Delhi, orders goods of A, at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them. and immediately afterwards stops payment. The goods are in transit.

(*c*) B, who lives at Poona, orders goods of A at Bombay. A sends them to Poona, by C. a carrier appointed by B. The goods arrive at Poona, and are placed by C at B's request, in C's warehonse for B. The goods are no longer in transit.

(*d*) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable, to A's order or assigns. The cotton arrives at London, but, before coming into B's possesson B becomes insolvent. The cotton has not been paid for. A may stop the cotton.

Continuance of right of stoppage.

101. The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been' delivered to the second buyer or to some person on his bahalf.

Cessation of right on assignment by buyer of bill of lading.

102. The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

Illustrations.—(a) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid, B becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to C who is not aware of his insolvency. A cannot stop the goods in transit.

(b) A sells and consigns certain goods to B. A being still unpaid, B becomes insolvent and, while goods are still in transit, assigns the bill of lading for cash to C, who knows that B is insolvent. The assignment not being in good faith, A may still stop the goods in transit.

Stoppage where bill of lading is pledged to secure specific advance.

103. Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by, way of pledge, to secure an advance made specifically upon it' in good faith, the seller cannot, except on payment or tender to the pledge of the advance so made, stop the goods in transit.

Illustrations.—(a) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bills of lading for these goods to C, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of 9,000 rupees. A is not entitled to stop the goods except on payment or tender to C of 5,000 rupees.

(b) A sells and consigns goods to B of the value of 12,000 rupees B assigns the bill of lading for these goods to C, to secure the sum of 5,000 rupees due from him to C, upon a general balance of account. B becomes insolvent. A is entitled to stop the goods in transit without payment or tender to C of the 5,000 rupees.

Stoppage how effected.

104. The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.

Notice of seller's claim

105. Such notice may be given, either to the person who has the immediate possession of the goods, or to the pincipal whose servant has possession. In the latter case, the notice must be given

at such a time, and under such circumstances, that the principle, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

106. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid. **Right of seller on stoppage.**

Illustration.— A sells to B 100 bales of cotton; 60 bales having come into B's possession, aud 40 being still in transit B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid.

Resale.

107. Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such resale. **Release on buyer's failure to perform.**

108. No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following case.— **Title conveyed by seller of goods to buyer.**

Exception 1.— When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehousekeeper's certificate, wharfinger's certificate. or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods, of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.— If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.— When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who before the contract is rescinded, buys them in good faith of the person in possession, unless the crciumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the orginal purchaser for any loss which the seller may have sustained by being pervented from rescinding the contract.

Illustrations.—(*a*) A buys from B, in good faith, a cow which B had stolen from C. The property in the cow is not transferred to A.

(b) A, a merchant, entrusts B, his agent, with a bill of lading, relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit. The property in the goods passes to D.

(c) A sells to B goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C. The property is not transferred to B.

(d) A, B, and C are joint Hindu brothers, who own certain cattle in common. A is left by B and C in possession of a cow, which he sells to D. D purchases *bona fide*. The property in the cow is transferred to D.

(e) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract. The property in the horse is transferred to C; and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract.

(f) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and before B rescinds the contract, sells the horse to C. The property is not transferred to C.

Warranty.

Seller's responsibility for badness of title

109. If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

Establishment of implied warranty of goodness or quality.

110. An implied warranty of goodness or quality may be established by the custom of any particular trade.

Warranty of soundness implied on sale of provisions.

111. On the sale of provisions, there is an implied warranty that they are sound.

Warranty of bulk implied on sale of goods by sample.

112. On the sale of goods by sample, there is an implied warranty that the bulk corresponds in quality to the sample.

Warranty implied where goods are sold as being of a certain denomination.

113. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Explanation.—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

Illustrations.—(a) A, at Calcutta, sells to B twelve bags of "waste silk," then on its way from Murshidabad to Calcutta. There is an implied wrrranty by A that the

silk shall be such as is known in the market under the denomination of "waste silk".

(b) A buys, by sample and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal" there is a breach of warranty.

114. Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by seller that the goods supplied are fit for that purpose.

Warranty where goods ordered for a specified purpose.

Illustrations.—B orders of A, a copper manufacturer, copper for sheathing a vessel. A, on this order, supplies. There is an implied warranty that the copper is fit for sheathing a vessel.

115. Upon the sale of an article of a wellknown ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Warranty on sale of article of wellknown ascertained kind.

Illustrations.—B writes to A, the owner of a patent invention for cleaning cotton—"Send me your patent cotton cleaning machine to clean the cotton at my factory." A sends the machine according to order. There is an implied warranty by A that it is the article known an A's patent cotton—cleaning machine but none that it is fit for the particular purpose of cleaning the cotton at B's factory.

116. In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

Seller when not responsible for latent defects.

Illustration.—A sells to B a horse. It turns out that the horse had, at the time of the sale, a defect of which A was unaware. A is not responsible for this.

117. Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not voidable: but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Buyer's right on breach of warranty.

Illustration.—A sells and delivers to B a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.

118. Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered, or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

Right of buyer on breach of warranty in respect of goods not ascertained.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty, but if he accepts the goods, and intends to claim compensation he must give notice of his

intention to do so within a reasonable time after discovering the breach of the warranty.

Illustrations.—(*a*) A agrees to sell, and, without application on B's part, deliver to B 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B. B may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(*b*) B agrees to buy of A twenty-five sacks of flour by sample. The flour is delivered to B, who pays the price. B, upon examination, finds it not equal to sample; B afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A for any loss caused by the breach of warranty.

(*c*) B makes two pairs of shoes for A by A's order. When the shoes are delivered they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect in the second pair.

Miscellaneous

When buyer may refuse to accept if goods not ordered are sent with goods ordered

119. When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

Illustration—A orders of B specific articles of China. B sends these articles to A in a hamper with other articles of China which had not been ordered. A may refuse to accept any of the goods sent.

Effect of wrongful refusal to accept.

120. If a buyer wrongfully refuses to accept the goods sold to him this amounts to a breach of the contract of sale.

Right of seller as to rescission on failure of buyer to pay price at time fixed.

121. When goods sold have been delivered to the buyer the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed, unles it was stipulated by contract that he should be so entitled.

Sale and transfer of lots sold by auction.

122. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Effect of use by seller, of pretended biddings to raise price.

123. If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

The Indian Contract (Amendment) Act, 1930.

(Act IV of 1930)

(Received the assent of the Governor General on the 15th March 1930).

An Act to amend the Indian Contract Act, 1872.

Whereas it is expedient to amend the Indian Contract Act, 1872, for the purposes hereinafter appearing; It is hereby enacted as follows :—

1. (1) This Act may be called the Indian Contract (Amendment) Act, 1930. **Short title and commencement.**

(2) It shall come into force on the first day of July, 1930.

2. For section 178 of the Indian Contract Act, 1872, the following sections shall be substituted, namely :—

178. Where a mercantile agent is with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge. **Pledge by mercantile agent.**

Explanation—In this section the expressions "mercantile agent" and "documents of title" shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

178-A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee requires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title." **Pledge by person in possession under voidable contract.**

APPENDIX C

Report of the Special Committee.

To

His Excellency The Governor-General in Council.

In accordance with the Legislative Department Resolution No. 471 29 C. & G, dated the 28th March 1929 (Appendix A), we, the members of the Committee appointed by the Government of India to examine the provisions of the Indian Sale of Goods Bill, have the honour to submit the following report:—

1. The Constitution of the Committee was as follows:—

Chairman.

The Honourable Sir Brojendra Lal Mitra, KT., Bar-at law, Law Member of the Council of the Governor-General.

Members.

(1) Mr. D. F. Mulla, C. I E. M. A., LL. B, Officiating Advocate General, Bombay.

(2) Mr M. R. Jayakr, M.A.. LL B., Bar-at-Law, M.L.A.

(2) Mr. Alladi Krishnaswamy Ayyar, Advocate General, Madras.

Mr W. T. M. Wright, C. I. E, I. C. S. Joint Secrtary and Draftsman to the Govermment of India, Legislative Department attended the meetings of the committee and Mr. J. R. Dhurandhar, LL B, Assistant Secretary to the Government of Bombay Legal Department acted as Secretary to the Committe.

2. The committee assembled at Simla on the 29th April 1929, when its first meeting was held, and continued its deliberations daily until the 9th May 1929. A bill to amend and define the law relating to the Sale of Goods, with the notes setting forth the reasons for the proposed amendments which had already been prepared in the Legislative Department of the Government of India, was placed before us, and formed the basis of our discussions.

3. Before the passing of the Indian Contract, Act, 1872, Chapter VII of which contains the law relating to the sale of goods or moveables, the law on this subject was not only uniform throughot British India but was also, outside the limits of the original juirsdiction of the High Courts, extremely uncertain in its application. Within the limits of the Presidency-towns, the rules of English law, including those in the Statue of Fraud, were applied, whilst in the mofussil it was doubtful whether the Statute of Frauds was applicable and, as observed by Indian Law Commissioners in their second Report, the Judge was to a great extent without the guidance of any positive law beyond the the rule that his decision should be such as he deemed to be in accordance with "justice, equity and good conscience." To remedy this unsatisfactory state of affairs, the Indian Law Commissioners framed, in their second Report, dated the 28th July 1866, a set of rules relating to the general law of contracts including therein provisions relating to the sale af moveables. The draft of the Law Commissioners underwent several changes at the hands of the then Law Members, Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But as stated by Sir James Stephen himself while presenting the Report of the Select committee on the Indian Contract Bill the chapter on the sale of goods, except in regard to the rule as to market overt, represented generally the English law on the subject as it then stood.

4. The rules of English law relating to the sale of goods had grown up mainly out of judicial decisions. Along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. They were, however, largely dominated by the provisions of the Statute of Frauds which was passed in the reign of Charles the Second. The Law Commissioners, as well as those who were ultimately responsible for framing of the Indian Contract Act, at once realised that the provisions of the Statute of Frauds, although followed in the Presidency-Towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of that Statute in consequence of its vague language."

5. In 1870, various branches of law were being codified in British India. The main object in view was, in the words of Sir James Stephen, "thet of providing a body of law to the Government

of the country so expressed that it might be readily understood both by English and Native Government servants without extrinsic help from the English law libraries." What was urgently needed was a guide for the Judge or magistrate who had but little training, derived little or no assistance from the Bar and worked at a distance from any law library.

6. Whatever merit the simple and elementry rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations. The law relating to the sale of goods appertains mainly to mercantile transactions. There can be no doubt that during the last half century conditions in this country relating to trade and business have under-gone material changes. Methods of business have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognit on to new principles, and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new relations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Court Act is not exhaustive, and to import therein analogies form the decision of the English Courts.

7. The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract Act has itself since 1872 undergone drastic changes and was finally codified in 1893 by the present Sale of Goods Act (56 & 57 Vict., C. 71), which discards many of the old common law rules upon which Chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice.

8. By the Bill referred for our consideration. the law relating particularly to the sale of goods is embodied in a separate enactment, although many of the general principles contained in the Indian Contract Act will continue to be applicable thereto. When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not, and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, *e. g*, the Transfer of Property Act, the Negotiable Instrument Act, and the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments ; and we hope that the Bill which we attach to our Report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above

9. The Bill referred to us was mainly based on the English Sale of Goods Act. 1893. This Act has stood the test of nearly thirty

five years of practical application, and in the words of Lord Parker in re Parchem (1918) A C. 157 at pages 160-161 "is a very successful and correct codification of this branch of the mercantile law." As is shown in Appendix B to our Report (1), most of the Colonies and Overseas Dominions have adopted and re-enacted the Act with only such small variations as have been found necessary to adapt its provisions to local circumstances. It is also remarkable that the Uniform Sales Act, passed in 1906 in the United States of America and adopted in twenty out of fifty-three States and territories, is based very largely on the English Act. These facts constitute striking evidence of the completeness and the universal suitability of its provisions.

10. In mercantile transactions a conflict of laws should as far as possible, be avoided. Uniformity of law in various countries, particularly in those which have business or trade dealings with one another, is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provisions of the English Sale of Goods Act so far as they are suitable to Indian conditions as the basis for the present Bill, and thus to make the Indian Law relating to the sale of goods as nearly as possible uniform with the law in force in other parts of the British Empire.

11. The provisions of the English Act are far more elaborate and comprehensive than those of Chapter VII of the Indian Contract Act. and in their arrangement the English Act is more logical and methodical. As we have already observed. it has revised and brought up to date the rules of the English Common Law. Moreover, the adoption of the English Act as the basis of the present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English Courts.

12. In adopting the provisions of the English Act we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt, is not suitable to Indian conditions, the rule has been rejected We have, moreover, carefully scrutinised the provisions of the English Act in the light of the decisions of the English Courts since 1893. and where those decisions have shown the provisions of the English Act to be defective or ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act which we consider necessary or useful to meet special conditions existing in India. The Bill as revised by us on the above lines is attached to our Report.

13. A detailed explanation of the various clauses of the Bill is set out in our notes in Appendix C (2). But we think it desirable to draw attention to the following points of importance:—

(a) The present Bill embodies the principles that the question whether a contract for the sale of goods does or does not pass the property in the goods from the seller to the buyer must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act are vague and conflicting

(1) See Appendix D.
(2) This Appendix is not reproduced in this work.

on this point. The Bill codifies the rule by which that intention may be ascertained but the operation of these rules will be displaced by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following this principle, we have borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know before hand what their legal position is they can provide for their particular wants by express stipulations. Sale, after all, is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either formed no intention or failed to express it.

(*b*) The distinction between a sale and an agreement to sell which was not clear in Chapter VII of the Indian Contract Act, has been clearly brought out. This distinction is very necessary to determine the rights and liabilites of the parties to the contract.

(*c*) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.

(*d*) Before 1893 the law in England relating to warranties and conditions was in a very confused state. In the Indian Contract Act the word "warranty" has been used in a very vague sense. In some provisions it denotes a condition which would enable a party aggrieved by its breach to repudiate the contract, while in others it enables him to claim damages only. In the Bill this ambiguity has been removed.

(*e*) There is much conflict of decisions in India regarding the meaning of Section 108 of the Indian Contract Act which relates to sales by ostensible owners. This is to a certain extent due to the obscure phraseology of the section itself. We have tried to remove this obscurity in clauses 27 to 30 of the Bill to simplify the law on the subject.

(*f*) We have elaborated the rules relating to delivery to carriers, stoppage in transit and auction sales.

(*g*) We have anxiously considered the question of the retention of the Illustrations appearing in Chapter VII of the Indian Contract Act and of the insertion of Illustrations to new provisions. Our decision is that the better policy is to forego all illustrations, leaving the Court to construe the sections as they stand.

14. In conclusion, we desire to place on record our high sense of obligation to Mr. W. T. M. Wright and Mr. J. R. Dhurandhar, who attended the meetings of the Committee and took part in deliberations. Mr. Wright rendered us great assistance in drafting the clauses of the Bill and in preparing this Report. Mr. Dhurandhar who acted as Secretary brought to bear upon the work great industry

in collecting references and otherwise assisting us in the preparation of our notes.

Simla ; 20th June, 1929.	B. L. Mitter.
Bombay ; 11th June, 1929.	D. F. Mulla.
Bombay : 17th June, 1929.	M. R. Jayakar.
11th June, 1929 Ootacamund ;	A. Krishnaswami Aiyar.

APPENDIX D

The English Sale of Goods Act, 1893, as adopted by some of the Colonies and Overseas Dominions.

Alberta, Sale of Goods Ordinance, Terr. Cons. Ord. 1898 C. 39 (omits section 22).

Bahamas, Sale of Goods Ordinance, 4 Edw. 7 c,37 (omits sections 49 (3) and 59, as applicable to Scottish law.)

Barbados, 1895, No. 91 (omits sections 4, 17 and 22).

British Columbia, Rev. St, 1911. C, 203 (has section 4, value 50 dollars ; has section 22, but introduces for protection of subsequent buyers, etc.. spceial provisions as to formalities of conditional sales).

British Guiana, Sale of Goods Ordinance, 1913 (Ord. No. 26) (has section 4, value 48 dollars ; has section 22, which applies to "goods sold in any public market held under the authority of the Government, or otherwise in accordance with the law, according to the usage of the market"; section 60, sub section (2), adds to the savings the law of warranty and suretyship).

British Honduras, 1899, No. 14.

Ceylon, 1896, No. 11 (section 4 is applied to all contract for the sale of goods. by omitting words limiting the value ; section 22 is omitted).

Gibraltar, 1895 No. 20 (has section 4, value 250 pesetas; omits section 22.)

Hong Kong, 1896, No 7 (has section 4, value 100 dollars ; has section 22 and defines market overt).

Isle of Man 1895, Sale of Goods Act (has section 4. value £ 5 ; section 24-Eng. secton 22, but is subject to the provisions of section 26 as to revesting of property on conviction where goods are *Stolen*).

Jamaica, 1895, No. 12 (omits section 22).

Manitoba, Rev. Stat. 1902, c. 152 (has section 4, value 50 dollars; omits section 22).

New Brunswick, 1919 c. 4.

Newfoundland, 1899, 62, Vict. c. 2 (has section 4, value 50 dollars ; omits section 22).

New Zealand, 1895, No. 23, new Sale of Goods Act, 1908, No. 168 (section 24-Eng. section 22, but sub-section (3) enacts that nothing in the Act "shall be construed to create overt in New Zealand.")

North-West Territories of Canada, Consol. Ord. 1905, C. 39 (has section 4, value 50 dollars; omits section 22; and adopts section 49 (3) and 59 from Scottish Law).

Nova Scotia, Sale of Goods Act, 1910 (has section 4, value 40 dollars; and section 32, sub-section (3), is made to apply to "sea, lake, or river" transit).

Ontario, c. 40, 1920.

Prince Edward Island, 1919, c, 11.

Queensland, 1896, 60 Vict. No. 6 (omits section 22).

Saskatchewan, Sale of Goods Act, Rev. Stat. 1909. c, 147 (has section 4 (50 dollars). The proviso to section 14, sub-section (1) is not adopted, whereas sections 49 (3) (dealing with interest on the price) and 59 (payment into Court are) adopted from Scottish law.

South Australia, 1895. No. 630.

Tasmania, 1896, No. 14 (does not adopt the Scottish law declared in sections 49 (3) and 59 ; adds in section 31 the words "or warrant" after "write of *fieri facias*" and before "or other writ". (Section 27, sub-section (2) saves the law relating to "cattle").

Trinidad and Tobago, 1895, No. 64 (omits section 22).

Victoria, 1896, No. 1422. (Part I is identical with the English Act, but the Victoria Act has a wider scope and provides for the law relating to consignees, mercantile agents, documents of title to goods, etc.

Western Australia, 1895, No. 41.

APPENDIX E

Report of the Select Committee

We, the undersigned members of the Select Committee to which the Bill to define and amend the law relating to the sale of goods, was referred. have considered the Bill and the papers noted in the margin and have the honour to submit this our report, with the Bill as amended by us annexed hereto.

The history of this Bill is as follows ;—In 1926-27 an exhaustive examination of the case law bearing on certain portions of the Indian Contract Act, 1872, including Chapter VII, which embodies the law relating to sale of goods, was made in the Legislative Department under the supervision of the late Mr. S. R. Das, then Law Member of the Executive Council of the Governor-General. In 1928 the results of that examination were considered by Mr. D. F. Mulla (now Sir Dinsha Mulla), at that time holding the office of the Law Member, and a draft Bill was prepared on the lines of the English Sale of Goods Act, 1893 (56 and 57 vic. c. 71) embodying the provisions of law relating to sale of goods in a separate enactment. In order to ensure general approval for a measure of such a highly technical character, the Government of India in 1929 appointed a Committee consisting of the Honourable the Law Member, Sir

Dinsha Mulla, Mr. Krishnaswami Ayyar, the Advocate General of Madras, and Mr. M.R Jayakar, Barrister-at-Law, M.L.A., to consider generally the question of amending the law relating to sale of goods contained in Chapter VII of the Indian Contract Act, 1872, and in particular to examine the draft Bill. This Committee agreed to the proposal that the law relating to the sale of goods should be embodied in a separate enactment, and considered the draft Bill referred to them, in which they made certain additions and alterations. The Bill as settled by the Committee was circulated for opinion by executive order, and was introduced in the Legislative Assembly in September 1929. The reason for the various clauses of the Bill are fully set out in the Report of the Committee which was appended as a Statement of Objects and Reasons thereto. The opinions received show that the Bill has met with almost unanimous approval in legal and commercial circles. The object, therefore, for which the Committee was appointed has been amply justified.

After considering the opinions received, we find ourselves in agreement with almost all the provisions contained in the Bill. We entirely approve of the scheme followed in the Bill in adopting as far as possible the provisions of the English Sale of Goods Act, 1893, in arrangement as well as wording. As pointed out in paragraph 9 of the Committee's Report referred to above, that Act has met with uniform approval and has stood the test for more than a third of a century. It has been adopted in most of the Overseas Dominions and Colonies and also in the United States of America. We feel that in commercial transactions there ought to be as far as possible uniformity of law in countries which have dealings with one another.

In the following notes we deal only with those provisions of the Bill which we consider require amendment, and with the more important suggestions received which we have been unable to accept.

Clause 1.—We propose that the Act should come into force on the first day of July, 1930.

Clause 2.—We have omitted the definitions in sub-clauses (1), (3) and (14) as not being necessary, and we have added a definition of "mercantile agent" in view of the use of that expression in clauses 27 and 30 as amended by us. The definition is taken from section 1 of the English Factors Act, 1889.

In sub-clause (9) (now sub-clause 7) in the definition of "goods," we have substituted "stock and shares" for the words "stocks and share certificates" for greater accuracy.

A suggestion has been made that a mate's receipt should be included in the definition of "documents of title to goods." We considered the suggestion and have come to the conclusion, that notwithstanding the irregular practice in Calcutta of treating a mate's receipt on the same footing as a bill of lading, a mate's receipt cannot be treated as a document of title. A mate's receipt is a mere acknowledgment of the receipt of goods on behalf of the ship. The person in possession of the mate's receipt is as a general rule entitled to a bill of lading, which is the document of title to the goods. The High Court of Calcutta has taken the same view and we are not aware of any judicial decision which regards a mate's receipt as a document of title. In England it has been held that mere endorsement or transfer of a mate's receipt without notice to the ship-owner

or his agent does not pass the property in the goods, and a custom to that effect is bad. (See Scrutton on Charter Parties, page 169). If a mate's receipt were treated as a document of title, then on the issue of a bill of lading without the mate's receipt having been surrendered, there will be two documents of title in existence relating to the same goods. This would be highly undesirable from a business point of view.

Clauses 5—In sub-clause (1) we have provided for 'part payment' and 'part delivery' in pursuance of suggestions made.

Clauses 8 and 10.—For the words "agreement becomes void" which occur in both clauses, we have substituted the words "agreement is avoided." In our opinion the latter expression, which occurs in the corresponding sections of the English Act, conveys the intention more clearly.

Clause 12—In sub clause (3) we have added the words "and treat the contract as repudiated", as their omission was unintentional. The clause now adheres closely to the definition of the word "warranty" in section 62 of the English Act.

Clause 25—It is suggested that a railway receipt should be placed on the same footing as a bill of lading in sub-clauses (2) and (3). In our opinion this suggestion is ill-conceived. Sub-clause (2) is really a prelude to sub-clause (3) and both of them refer to carriage by sea. A reference to a railway receipt in either of them would be inappropriate. In our opinion the case of transmission by rail is covered by sub-clause (1).

Clauses 27 and 29.—Clause 27 deals with the sale of goods by a person who is not the owner thereof. Clause 29 deals with the sale of goods by a person who has obtained possession thereof under a voidable contract. The suggestions received on these two subjects may be divided into three classes.

(1) The English law relating to sale in market overt should be introduced in British India, "as it will relieve merchants of their anxiety when dealing with goods, especially in case of jewellery, ornaments, etc."

(2) The words at the end of clause 29 relating to offences should be deleted.

(3) A sale in a shop during business hours by shop keeper or his servants should pass a valid title to a *bona fide* purchaser for value.

First, as to sales in market overt, the English law is thus stated in Benjamin on Sale (6th ed. pp. 17 *et. seq.*)

"An important exception to the rule that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in market overt. Section 22 of the Sale of Goods Act, 1893, provides that 'where goods are sold in market overt, according to the usage of the market, the buyer acquired a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.' Market overt in the country is held by charter or prescription on special days; but in the City of London every day except Sunday is. In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include

shops, but in the city of London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in. Market overt is 'an open, public and legally constituted market.' The shop in London must be one in which goods are openly sold; that is, sold in the presence and sight of any one entering the shop."

In London this custom is confined to shops in the City; it does not extend to the whole of the metropolitan area. It does not protect a sale in a shop outside the City bounds. e. g. in Regent Street; nor a sale in a place within the City bounds which is not a shop, e. g., a public auction room. (See Claytion vs. Le Roy (1911) 2 K B. 1031).

If the rule as to sales in market overt is to be introduced in British India, the first question that arises is as to the prices to which it should be applied. This is a difficult question. Outside the City of London a market may become a market overt either by grant or prescription but the custom does not apply to a market established by a local Act. It is also doubtful whether the user, though for twenty years, of a market *de facto* is sufficient to establish a legal market so as to make sales therein sales in market overt. Such being the intricacies of the English law, we do not think it would be safe to introduce the rule as to sales in market overt throughout the length and breadth of British India.

The second suggestion is that the words at the end of clause 29, relating to offences, should be deleted. The present law on the subject is contained in Exception 3 of Section 108 of the Indian Contract Act, 1872, which is as follows:—

"When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession of those whom he represents."

The above Exception presupposes a contract, and does not apply unless there is a contract. Where goods are obtained by theft, there is no contract, and the Exception does not apply. The thief has no title and can give none.

Where goods have been obtained by fraud, the person who has obtained them may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud be such that there never was a contract between the parties (as. for instance, if A obtains goods from B by falsely pretending to be X's agent, though buying on his own account) then the person who so obtains the goods has no title, and can give none In this case also there is no contract between A and B. But if A buys goods from B and the price is paid partly in cash and partly by giving a bill purporting to be accepted by X, and A then sells the goods to C, and it turns out that X was a fictitious person, and that B was defrauded, there is a contract which B may affirm or rescind at his option. In other words, to use the language of Exception 3, there is "a contract voidable at the option of the other party thereto." But the contract was procured by A by cheating B, and cheating is an offence under section 415 of the Indian Penal Code. The contract having been

procured by an offence the property in the goods does not, under the existing Indian law, pass to A, though it does under the English law. This is indeed a hard case, and it is proposed to amend section 108 by eliminating the words at the end beginning with "unless the circumstances," etc. At the same time to make it quite clear to what cases clause 29 applies, we have in that clause specifically referred to sections 19 and 19A of the Indian Contract Act, 1872. A contract under these sections is voidable on the ground of misrepresentation, fraud, coercion or undue influence.

The first condition necessary for the application of clause 29 as now drafted is that there must be a contract It is clear that there can be no contract where goods have been obtained by theft, as defined in section 378 of that Code. Clause 29 as drafted by us will not apply to this class of cases. The principal change made by clause 29 in the existing law is that a person buying in good faith from a person who has obtained possession of goods under a voidable contract, acquires a good title to the goods, even if the contract was induced by fraud amounting to cheating.

A similar clause in respect of pledges has been inserted in the Indian Contract (Amendment) Bill. That clause will be section 178A of the Indian Contract Act, 1872.

The above changes have been suggested in many of the opinions from the commercial bodies.

The third suggestion is that a sale in a shop during business hours by the shop-keeper or his servant should pass a valid title to a *bona fide* purchaser for value. This goes far beyond anything known in the English law, and even beyond the law as to sales in market overt. It is impossible to accede to such a suggction.

Clause 30—We have amended clause 30 by adding in two places, the words "or by a mercantile agent acting for him." This had rendered it necessary to define the expression "mercantile agent,' and we have defined it accordingly in the definition clause. We have used this term also in clause 27 of the Bill and in clause 2 of the Indian Contract (Amendment) Bill.

Clause 54.—In this clause we have provided that the re-sale shall take place within a reasonable time.

Clause 60.—There is a suggestion that a provision should be made in this clause to the effect that in the case of anticipatory breach, damages should be assessed on the basis of the market price on the date of repudiation. We do not approve of this suggestion; for if damages are assessed on the basis of the market rate of the date of repudiation, a party apprehending heavy loss on the due date, may take advantage of a favourable market and repudiate the contract before the due date. This we consider unreasonable. In a series of decisions it has been laid down that damages in such cases are to be assessed as on the due date (*Vide* I.L.R. 30 Cal. 477, 36 Cal. 617, 43 Cal. 305). In our opinion the measure of damages must be left to the general provision contained in sections 73 and 74 of the Indian Contract Act.

2. We have made a few alterations of a purely drafting nature to which we have not thought it necessary to refer in detail.

3 The Bill was published as follows:

In English.

Gazette	Date
Gazette of India	17th September, 1929
Fort St George Gazette	6th August, 1929
Bombay Government Gazette	5th September, 1929
Calcutta Gazette	1st August 1929
United Provinces Gazette	6th July 1929
Punjab Government Gazette	30 August, 1929
Burma Gazette	27th July 1929
Central Provinces Gazette	27th July 1929
Assam Gazette	18th September, 1929
Bihar and Orissa Gazette	7th August 1929
Coorg District Gazette	2nd September, 1929
Sind Official Gazette	19th September, 1929
North-West Frontier Gazette	2nd August, 1929

In the vernacular.

Province	Language	Date
Madras	Tamil	1st October, 1929
	Telugu	1st October 1929
	Hindustani	22nd October, 1929
	Kanarese	8th October, 1929
	Malayalam	1st October, 1929
Bombay	Marathi	14th November, 1929
	Gujarathi	14th November 1929
	Karnatese	12th December, 1929
	Urdu	26th December, 1929
Central Provinces	Marathi	26th October, 1929
	Hindi	2nd November, 1929
Sindh	Sindhi	24th October, 1929

B. L. MITTER.
D. F. MULLA.
M. SHAH NAWAZ.
ABDUL QADIR SIDDIQI.

The 18th January, 1930.

APPENDIX F

CONFLICT OF LAWS.

As already stated (see page 7) some times in commercial transactions between persons residing in different countries points of dispute arise and it is to be ascertained, what is the true rule by which the validity, obligations and interpretation of contracts are to be governed. There are, however, certain principles of universal application, admitted by the whole world, though on matters in detail on these points there may be diversity in the positive and customary laws of different countries and nations. The object of this Appendix is to describe briefly those general principles. The Problem

General Principles.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two preliminary questions.

(1) Is the case before him one which the Court has according to the law of the country in which it is being heard, a right to determine ?—*Jurisdiction.*

(2) What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the law of the country to be determined ? *i. e.* an inquiry as to *choice of law.*

As regards *jurisdiction* and *choice of law*, the following general principles have been laid down for the English Courts. Jurisdiction and choice of law

(*i*) Any right which has been duly acquired under the law of any civilized country is recognised and in general, enforced by English courts, and no right which has not been duly acquired is enforced or, in general, recognized by English Courts (1).

(*ii*) English Courts will not enforce a right otherwise duly acquired under the law of a foreign country :

(*a*) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra territorial operation ;

(*b*) Where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions;

(*c*) Where the enforcement of such right involves interference with the authority of a foreign state within the limits of its territory (2).

The Courts of any country have jurisdiction over (*i.e.*, have a right to adjudicate upon) any matter with regard to which they can give an effective judgment, and have no jurisdiction over (*i.e.*, have no right to adjudicate upon any matter with regard to which they cannot give an effective judgment (3).

(*iv*) The courts of any country have a right to exercise jurisdiction, *i.e.*, are Courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction (4).

(1) Dicey Conflict of Laws, 5th Edn., p. 17 (3) Ibid. p. 30.
(2) Dicey, Conflict of Laws, 5th Edn., p. 25. (4) Ibid, p. 32.

(v) The incidents of a right of a type recognised by English law acquired under the law of any civilized country must be determined in accordance with the law under which the right is acquired (1).

(vi) Wherever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties (2).

See also on this point Code of Civil Procedure, 1908, for Jurisdiction of Indian Courts.

Validity of contract.

(i) Where any Act of Parliament intented to have extra-territorial operation makes any contract.

(1) valid; or
(2) invalid;

the vaildity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament, independently of the law of any foreign country whatever (3);

(ii) A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure (4).

Capacity to contract.—*lex loci contractus*.

A person's capacity to bind himself by an ordinary mercantile contract is governed by the law of the country where the contract is made (*lex loci contractus*) (5).

It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place were the contracting party is domiciled. In *Cooper* v. *Cooper* (6) it was observed: "Perhaps in this country the question is not finally settled though the preponderance of opinion here, as well as abroad seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule."

Dicey has observed on this point (7):

"On the one hand it apperars to be established that in accordance with Rule 158 capacity to marry or to enter into a contract with marriage depends on the *lex domicilii* of the contracting party; and it is further clear that the language judicially used in *Soottomayor* v. *De Barros* (8) implies that a person's *lex domicilii* governs his capacity to enter into any contract whatever. On the other hand, there are strong grounds for holding that capacity to enter into an ordinary mercantile contract, *e.g.*, for a loan or for of the purchase or sale of goods, is governed not by the *lex domicilii* of the contracting party, but by the law of the place when the contract is made (*lex loci contractus*). Story certainly holds to this opinion. In one reported case, where the point is distinctly raised though not precisely decided, Lord Eldon held, in regard to a contract made by an English

(1) Dicey, Conflict of Laws, 5th Edn., p. 43.
(2) Ibid, p. 44.
(3) Dicey, Conflict of Laws; 5th Edn., p. 629.
(4) Ibid, p. 631.
(5) Dicey, Conflict of Laws, p. 637.
(6) 1888, 13 App. Cas. 88, 108.
(7) Conflict of Laws, 5th Edn., p. 638.
(8) (1877), 3 P. D. (C. A.) 1.

infant in Scotland, that the effect of infancy, as a defence to an action on the contract, depended upon the law of scotland. To this may be added that to allow the validity of an ordinary contract made in England by a person domiciled abroad to depend upon the law of his domicil would often lead to inconvenience andinjustice. It would certainly be strange if an Englishman of the age of 24, who happened to be domiciled in a country where the age of majority is fixed at 25 could escape liability for the price of goods, not being necessaries, brought by him from a tradesman in London by pleading that he was a minor under the law of his foreign domicil and not liable for the price of the goods. Similarly it is not desirable that a young Indian of age 18, though a major in Indian Law, shall be denied the advantage of the English legislation in favour of minors.

It is possible that the Exception should rather ascribe capacity as regulated by the proper law of the contract. which normally in the *lex loci contractus* as regards capacity to enter into the contract. This would provide for the case of a contract entered into in one country where the person contracting had not capacity, but to be carried out into another where he had such capacity. But it is not improbable that the contract in such a case might be held invalid in its inception, unless perhaps it was valid by the law of the domicil of the contracting party and was held to fall under the general terms of Rule 158. English authority is lacking".

Form of the contract.

The formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*). Any contract is formally valid which is made in accordance with any form recognized as vaild by the law of the country where the contract is made and no contract is valid which is not made in accordance with the local form(1).

Exceptions

(*i*) A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*) (2).

(*ii*) A contract made in one country but intended to operate wholly in, and to be subject to the law of, another country, may be vaild, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (3).

Material or essential validity.

The material or essential validity of a contract is in general governed by the proper law of the contract (4). By the term "proper law of the contract" is meant 'the law, or laws, by which the parties to a contract intended or may fairly be presumed to have intended,' the contract to be governed; or (in other words) the law or laws to

(1) Dicey, Conflict of Laws, 5th Edn., p. 64.
(2) Ibid p. 644.
(3) Ibid, p. 645
(4) Ibid, p. 647

which the parties intended or may fairly be presumed to have intended, to submit themselves (1).

Exceptions,

(*i*) A contract (whether lawful by its proper law or not) is invalid if it, or the enforcement thereof is opposed to English interests of State, or to the policy of English Law, or to the moral rules upheld by English Law (2).

(*ii*) A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (3).

(*iii*) A contract (whether lawful by its proper law or not) is, in general, invalid is so far as

(*a*) the performance of it is unlawful by law of the country where the contract is to be performed (*lex loci solutionis*) ; or

(*b*) the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place.

This Exception (*semble*) does not apply to any contract made in violation, or with a view to the violation of the revenue or trade laws of any foreign country not forming part of the British dominions (4).

Interpretation and effect of contracts.

The interpretation of a contract and the effect *i.e.*, the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract (5).

Rules for determining the Proper Law of a Contract in Accordance with the Intention of the Parties.

(*i*) Where the intention of the parties to a contract, or to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption (6).

(*ii*) When the intention of the parties to a contract, with regard to the law governing the contract, is not expressed in words, their intention is to be inferred from the terms and nature of the contract. and from the general circumstances of the case, and such inferred intention determines the proper law of the contract (7).

(*iii*) In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

first presumption.—Prima facie the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed any where, but it may apyly to a contract partly or even wholly to be performed in another country.

Second presumption.—When the contract is made in one country, and is to be performed either wholly or partly in another, then

(1) Dicey, p. 628.
(2) Dicey, Conflict of Laws, 5th Edn., p. 652.
(3) Ibid, p. 756.
(4) Ibid, p. 657.
(5) Ibid, p. 668.
(6) Ibid, p. 668.
(7) Ibid, p. 669.

the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*) (1).

The discharge of the contract.

The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract. A discharge in accordance with the proper law of the contract is valid. A discharge not in accordance with the proper law of the contract is not valid (2).

See also notes on pages 7 and 8.

APPENDIX G

The Indian Bills of Lading Act, 1856.

(Act IX of 1856).

(*Received the assent of the Governor-General on the 11th April 1856*).

An Act to amend the law relating to Bills of Lading.

Preamble.

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid; It is enacted as follows:—

Rights under bills of ladings to vest in consignee or endorsee

1. Every consignee of goods named in a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Not to affect rights of stoppage in transitu or claims for freight.

2. Nothing herein contained shall prejudice or effect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Bills of lading in hands of consignee etc. conclusive evidence of the shipment as against master, etc.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board : Provided that the master or other person so

(1) Dicey, Conflict of Laws, 5th Edn. p. 671. (2) Ibid, p. 678.

signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper of the holder, or some person under whom the holder claims.

APPENDIX H

"C. I. F."; "F. O. B." and "Ex-ship" Contracts.

"C. I. F." Contracts.

Nature of Contract.

Evolution of contract.

"The commercial reason for the evolution of the "C. I. F." contract lies in the length of time taken in the carriage of goods by sea. It is to the advantage of neither seller not buyer that the goods, the subject-matter of the contract, should remain *en dehors* commerce while they are in course of shipment. It is to the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale. and until he has received actual payment of the price he normally desires to be able if he wishes, to obtain credit upon the security of the transaction. The buyer, on the other hand, normally desires to be able to deal with the goods, for resale or finance as soon as possible. To meet these business necessities on the part of both buyer and seller the "C. I. F.". contract was evolved (1).

Meaning of C. I.F contract.

A C. I. F. or C. F. I contract, as it is sometimes called, is a contract for the sale of goods upon cost, freight and insurance terms. This type of contract has certain peculiar features which distinguish it from the ordinary contract for the sale of goods. Although the C. I. F. contract does not fall outside the scope of the Sale of Goods Acts (2) (English and Indian), there are certain provisions in those acts which are either wholly inapplicable to this class of contracts. or when applied to it must be read subject to certain qualifications.

Under an ordinary C I.F. contract the seller has "*firstly* to ship at the port of shipment goods of the description contained in the contract; *secondly*, to procure contract of affreightment under which goods will be delivered at the destination contemplated by the contract; *thirdly*, to arrange for an insurance upon the terms current in the trade which will be available to the buyer; *fourthly*, to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (3), or in some similar form; and *finally* to tender these documents to the buyer, so that he may know what freight he has to pay, and obtain delivery of two goods if they arrive, or recover for their loss if they are last on the voyage (4). Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract shall be delivery on board ship at the port of shipment. It follows that aginst tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case payment before the arrival of the goods in this country was involved."

(1) Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 210.

(2) See Biddel Brothers v. E. Clemens Horst (1911) 1 K. B. 934, at pp. 955 et. seq., per Kennedy L. J.

(3) 1872 L. R. 5 H. L. at p. 406.

(4) Biddell Brothers v. E. Clemens Horst & Co., (1911) 1 K. B., per Hamilton J. at p. 220: A. I. R. 1925 cal. 941=89 I. C. 686.

To the five requisites mentioned above, a sixth one may be added, namely, that the sellers must with all reasonable despatch send forward the shipping documents to the buyer at the place of destination, or if none such is named in the contract, *prima facie*, at the residence or place of business of the buyer (1).

Duties of seller.

(a) Shipment of the goods

The first duty of the seller is to ship at the port of shipment goods of the contract description. If the goods do not correspond with the contract description, there is a breach of contract when the goods are shipped (2), although, when the claim is for non-delivery, the place of breach is the place where the documents ought to have been tendered (3). The case would no doubt be different where there has been an absolute refusal to ship (4).

"Shipment" in an English contract means putting on borad a ship, and evidence of usage to the contrary cannot be given to contradict the express terms of the contract (5).

Generally speaking in a "C.I.F." contract the time of shipment is a condition of the contract and not merely a warranty (6), and a breach of a term as to date of shipment entitles the buyer to repudiate the contract. Where no time for shipment is stated, the goods must be shipped within a reasonable time (7).

In the absence of express agreement as to the route of shipment the goods must be shipped by a usual route (8). They must be shipped by the vessel or type of vessel stipulated in the contract (9) or, if the contract is silent on this point, by a type of vessel customary in the trade (10). Breach by the seller of any of these terms, whether express or implied entitles the buyer to repudiate the contract (11).

If the goods are not of the description contained in the contract the buyer's right to reject them or to recover damages for breach of contract is not precluded because the buyer has paid against the documents (12).

(b) Procuring a contract of affreightment—bill of lading.

(1) Johnson v. Taylor (1920) A. C. 144, at p. 156, per Lord Atkinson. See also Landauer v. Craven (1912) 17 Com Cas. 193, at p 202 ; Groom v. Barber, (1915) 1 K. B. 316 ; Karberg v. Blythe (1916) 1 K. B. 495, at p. 513.

(2) Parker v. Schuller (1901) 17 T. L. R. 299 C. A ; Crozier v. Anerbach (1908) 2 K. B. 161, C. A.

(3) Biddel Bros. v. E. Clemens Horst, supra, per Kennedy L. J. at pp. 961, 962.

(4) See Johnson v. Taylor (1920) A. C. 144.

(5) Mowbray, Robinson & Co. v. Rosser (1922), 91 L. J. (K. B) 524. C.A. ; but the language of the particular contract may indicate a wider meaning (see Halsbury, Laws of England, 2nd Edn. Vol, XXIX, p. (214). See also Hansson v. Hamel (1922) 2 A. C 36, at p 47 and Foreman v Blackburn (1928) 2 K. B 60 as to the meaning of "shipment".

(6) Bowes v. Shand (1877), 2 App. Cas. 455.

(7) Landauer & Co. v. Craven and Speeding Brothers, (1912) 2 K. B. 94, per Scrutton J at p 105.

(8) Postlethwaite v. Freeland (1880), 5 App. cas. 599, at p. 616.

(9) Cf Ashmore & Son v. Cox, (1899) 1 Q. B 436, at p. 441.

(10) Ranson, Ltd. v. Manufacture Engrais (1922), 13 L. 1 L. R. 205.

(11) Ibid, Ashmore & Son v. Cox supra ; See also Halsbury, Laws of England, 2nd Edn., Vol. XXIX. p. 215.

(12) Polenghi v. Dried Milk Co., (1904) 10 Com. Cas. 42 ; See Biddell Bros. v. E Clemens Horst, supra.

The seller must procure a contract of affreightment to ultimate destination covering the whole transit (1). A through bill of lading from an intermediate port is insufficient (2). Where goods were shipped from Norway for Japan under a *c. i. f.* contract, and were transhipped at Hamburg, it was held that the buyers were not bound to accept a document purporting to be a through bill of lading issued at Hamburg, on the ground that it was not issued on shipment, and did not give the buyers any protection during the first stage of the transit (2).

The contract of affreightment must be a reasonable contract and must satisfy S. 39 (2) of the Act. The duty of the seller to procure a contract of affreightment is satisfied if he procures a contract of affreightment which is normal and usual in the trade (3). He must also procure a bill of lading evidencing the contract of affreightment. No other document *e g.*, delivery order (4) or ship's release (5), will amount to a good tender under the contract.

Bill of ladin

The typical bill of lading, as known to merchants, is a receipt for goods shipped on board a ship; it is signed by the person who contracts to carry them, or his agent, normally the master of the ship and it states the terms of the contract of carriage under which the goods have been delivered to and received by the ship (6). During the period of transit and voyage the bill of lading is, by the law merchant, recognised as the symbol of the goods described in it, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the goods Property in the goods passes by such indorsement whenever it is the intention of the parties that the property should pass, just as in similar circumstances the property would pass by actual delivery of the goods (7). The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons (8). He is thus in the same commercial position as if the goods were in his physical possession subject to the qualification that he takes the risk of non-delivery of the goods by the ship-owner and that in order to obtain actual delivery of the goods from the shipowner, he may be obliged to discharge the shipowner's lien for freight (9).

Whether a particular form of receipt for goods is a bill of lading such as is required under a *c.i.f.* contract, would appear to be a question of fact in each case (10).

The characteristics generally required by the common law to exist in a bill of lading, if it is to be a good tender, under a *c. i. f.*

(1) Landauer v. Craven; supra; Biddell Bros. v. E, Clemens Horst Co., supra; Johnson v. Taylor Bros., (1920) A. C. 144; Lecky v. Ogilvy, 3 comm. Cas. 29 (C. A.)

(2) Hansson v. Hamel, supra.

(3) Burstall & Co. v. Grimsdale (1906), 11 Com. Cas. 280, A c.i f. contract may involve some land transit.

(4) Re Denbigh Cowan & Co. and Atcherley (R) & Co. (1921), 90 L. J. (K. B.) 836, C. A.

(5) Heilbut, Symons & Co., Ltd. v. Harvey & Co. (1922), 12 L. 1 L. R. 455.

(6) Sewell v. Burdick (1884), 10 App. Cas. 74, at p. 105.

See also Nissim I Bekhor v. Haji Sultanalli Shustary (1915) 17 Bom. L. R. 349.

(7) Sanders Bros v. Maclean (1883), 11 Q. B. D. 327, C. A.

(8) Glyn, Mills & Co. v. East & West India Dock Co., (1882) 7 App. Cas. 591.

(9) See Halsbury, Laws of England, 2nd Edn. Vol. XXIX p. 211.

(10) See Diamond Alkali Corporation v. Bourgeois (1921) 3 K. B. 443, 452, 453, distinguishing. The Marlborough Hill (1921) 1 A. C. 444 P. C.

contract are so required only because it is the general custom of merchants that such a bill of lading shall possess those characteristics.

If in any particular trade there is a custom that bills of lading should have other characteristics in addition to or in substitution for those generally required by the custom of merchants, then in that trade, bills of lading, to be good tender, need only conform to that custom (1).

In the absence of stipulation to the contrary the bill of lading must be one which will give the holder a right of action against the shipowner in respect of the goods from time of shipment until arrival at destination (2). The bill of lading must be procured upon shipment, *i.e*, as soon as is reasonably possible after the goods have been delivered on board (3). The bill of lading must cover only the goods which are the subject matter of the contract of sale (4).

It has been observed that a contract of affreightment is put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster (5). The buyer is entitled to refuse to accept an enemy bill of lading even though the contract was entered into before war (6).

(c) *Insurance.*

In the case of sale of goods under an ordinary contract, S. 39 (3) of the Act provides that where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and that if the seller fails so to do. the goods shall be deemed to be at his risk during such sea transit. In the case of a *c.i.f.* contract, however, it is the duty of the seller to arrange for insurance on terms current in the trade for the benefit of the buyer. The question as to whether the policy tendered fulfils this requirement is one of fact.

The goods must be covered by the policy to an amount equal to their reasonable value on shipment (7). The policy must be procured from responsible insurers, and must be a valid policy (8). It must cover only the goods sold (9) and must cover them for the whole of the transit (10).

The goods must be covered by an effective policy, and the fact that the goods arrive safely does not excuse the seller for not having effected or tendered a policy (11). The buyer is entitled to have a policy tendered to him, and the mere assertion by the seller that a policy exists is insufficient (12). An open cover protecting all goods

(1) N. N. Arnold Otto Meyer v. Aune, 3 All. E. R. 168 (K. B. D.) ; 55 T. L. R. 876.
(2) Hansson v. Hamel and Harley, Ltd., (1922) 2 A. C. 36.
(3) Landauer & Co. v. Craven, supra.
(4) Re Keighley, Maxted & Co., (1894) 70 L. T. 155 C. A.
(5) Marshall v. Naginchand (1916) 18 Bom. L. R. 915
(6) Karberg v. Blythe (1916) 1 K. B. 495 C. A. ; Duncan v. Schrempt (1915) 3 K. B. 355, C. A.
(7) Johnson v. Taylor Bros. (1920) A. C. 144, at p. 149. The insurance need not cover the freight.
(8) Cantiere Meccanico Brindisino v. Constant (1912), 17 Com. Cas. 182, p. 192.
(9) Lickox v. Adms (1876), 34 L. T. 404, C. A.
(10) Landauer & Co. v. Craven, Supra.
(11) Orient Co. v. Brekke (1913) 1 K. B. 531.
(12) Manubre Saccharine Co. v. Corn Products Co. (1919) 1 K. B. 198.

shipped by the seller is not sufficient (1). Similarly, a broker's cover note or a certificate of insurance is not a good substitute for an insurance policy (1).

A seller who has effected a proper insurance under a *c.i.f.* policy may retain for his own benefit "increased value" policies which he has subsequently taken out (2).

War risks.

The seller is not bound to insure against war risks even if at the time of the contract war is imminent unless such insurance is usual (3). It was accordingly held in in *Nissim I. Bekhor* v. *Haji Sultanalli Shustary* (4) that where the seller's agent in England on the ourbreak of the last great war insured the goods which were shipped from Newport against war risks at 10 per cent. premiums the defendants were not liable to pay the war insurance premium. In *Groom* v. *Barber* (5) the words "war risk for buyer's account" were held to mean that war risk was the buyer's concern, and if he wanted to cover war risk he must get it done.

A contract by a seller to insure cattle sent abroad against "all risks" was held not to be satisfied by taking out a Lloyd's "all risks" policy, if it contained the free of "capture and seizure "clause (6).

Existing insurance.

Buyer is entitled to full benefit of existing insurance on goods purchased as insured (7) ; but *not* where sellers had a so-called "profit insurance" (8) ; and *not* where contract stipulated "any amount over 2 per cent. over-invoice amount to be for seller's account" (9).

(*d*) *The Invoice.*

The invoice is the written account of the particulars of goods delivered to the buyer with the value or prices or charges annexed (10). Under a *c.i.f.* contract the invoice must be made out debiting the buyer with the agreed price and giving him credit for the amount of freight which he will have to pay to the shipowner on actual delivery (11), or in some similar form (12).

Provisional invoice

When a *c.i.f.* contract provided for a provisional invoice to be sent "thirty running days' from the date of the bill of lading, the last possible day for its arrival was treated as the date when the breach of contract occurred (13).

(*e*) *Tender of the documents.*

Shipping documents are necessary to enable the buyer to deal with the goods in the usual way of business and therefore a seller under a c.i.f. contract is bound to tender to the buyer the customary

(1) Wilson v. Belgian Grain Co. (1920) 2 K. B. 1 ; see also Diamond Alkali v. Bourgeois, Supra.
(2) Strass v. Spillers (1911) 2 K. B 759.
(3) Law & Bonar v. British American Tobacco Co. (1916) 2 K B. 605.
(4) (1915) 17 Bom. L. R. 249.
(5) (1915) 1 K. B. 316.
(6) Yuill v. Scott (1908), 1 K. B. 270, C. A., but see Vincentelli v. Rowlett (1916) 16 Com. Cas. 310 ; British and Foreign Marine Insurance Co. v. Gaunt (1921) 2 A. C. 41 at p. 57 (scope and limits of "all risks policy" discussed).
(7) Ralli v. Universal Marine Insurance Co. 31 L. J. Ch 313; Powles v. Innes, 11 M. & W. 10, Landauer v Asser (1905) 2 K. B. 184
(8) Harland v. Burstall & Co 84 L. T. 324.
(9) Strass v. Spillers & Baker (1911) 2 K. B. 759.
(10) Halsbury, Laws of England, 2nd Edn. Vol. XXIX, 217.
(11) Ireland v. Livingston (1872), L. R. 5 H. L. 395, at p. 406.
(12) Biddell Bros. v. E. Clemens Horst (1911) 1 K. B. 214, at p 220.
(13) Produce Brokers Co. v Weis. 87 L. J. K. B. 472.

or agreed shipping documents. The contract often specifies in detail the documents to be tendered and where this is so, all the documents called for by the contract must be tendered (1); but where the contract is silent it is sufficient if the seller tenders the bill of lading, policy of insurance, and invoice and where bills of lading are issued in sets of three, the tender of one bill is sufficient in the absence of stipulation to the contrary (2).

The place of tender

Where the contract is silent as to the place of tender, is *prima facie* the residence or place of business of the buyer (3); but slight evidence of trade usage or of a course of business between the parties would be sufficient to rebut this presumption (4).

The tender of documents must be made at a reasonable hour (5).

The documents tendered must be valid and effective at the time of tender (6). All these documents must be made out in proper form, and in terms not inconsistent with the contract, and a tender of some only of the documents, or of insufficient or irregular documents, is an invalid tender.

The documents must be sent forward and tendered to the buyer with all reasonable despatch (7). The documents must be valid shipping documents under which the buyer can obtain either the goods themselves or, in case of their loss, a legal remedy for their non-delivery (8). A bill of lading which has become a void contract owing to the outbrake of war is not a valid shipping document (9).

A c.i.f. contract is not a mere sale of documents, so as to cast upon the buyer the risk of the documents remaining valid after shipment. It is still a sale of goods, thongh they are deliverable by means of documents, and, as already pointed out, the documents must accordingly be proper and valid at the time of tender. If they are so, the buyer must pay upon them, although it may be obvious at that time that actual delivery of the goods is impossible in fact, for *prima facie* the buyer, as between him and the seller, arrives all risks of delivery affecting the goods themselves (10).

There is a valid tender if proper documents have been tendered even after knowledge that the goods have been lost, provided that the

(1) Re Denbigh Cowan & Co and Atcherley & Co (1921) 90 L J. K. B. 836, C. A. Scott & Co. v. Barclays Bank, Ltd. (1923), 28 Com. Cas. 253. C A

(2) Sanders Brothers v Maclean (1883), 11 Q B. D. 327, C. A.; Caderberg v. Borries, Craig & Co. (1885), 2 T. L. R. 201; Biddell Bros. v. E. Clemens Horst Co (1911) 1 K. B. 214.

(3) Johnson v. Taylor Brothers & Co, Ltd. (1920) A. C. 144; Stein, Forbes v. County Tailoring Co. (1916) 115 L. T. 215.

(4) Thus, where payment is to be made by a banker under a confirmed credit, the place of tender will be the banker's place of business.

(5) Section 86, Sale of Goods Act, 1930.

(6) Cantiere Meccanico Brindisino v. Constant (1912), 17 Com. Cas 332 C. A. (void policy of insurance), Arnhold Karberg & Co v Blythe (1916) 1 K B. 495 C. A.; (contract of affreightment void owing to outbreak of war); cf. Re Weis & Co, Ltd, and Credit Colonial et Commercial, Antwerp.

(7) Johnson v Taylor, Supra, Sharpe v. Nosawa, (1917) 2 K. B. 814.

(8) See Groom v. Barber (1915) 1 K. B. 316; Karberg v. Blythe (1916) 1 K. B. 495.

(9) Marshall v. Naginchand (1916) 18 Bom. L. R 915; Karberg v. Blythe, supra

(10) Groom v. Barber, Supra; Olympia Oil Co v. Produce Brokers Co. (1917) 1 K. B. 320; Clark v. Cox, McEuen & Co. (1921) 1 K. B. 139.

goods are covered by a policy which can be assigned to the buyer (1). An English buyer from a foreigner on *c.i.f.* terms is not entitled to ask for an English policy, but he may reject the goods if the policy tendered does not specify the risks insured against (2)

As the buyer under a *c.i.f.* contract seldom sees the goods before the contract is entered into, practically all c.i.f. contracts are sales by description. Where the goods do not correspond with the description contained in the contract, the breach is deemed to take place when the goods were shipped (3).

The cause of action for breach by non-delivery arises where the documents ought to have been tendered. Tne contract is broken when the documents ought to have been tendered and damages must be estimated accordingly (4).

Duties of buyer.

(*i*) *Price.*

The price payable is that agreed upon by the contract of sale. Where duties are payable upon the goods, export duties, being part of the expenses of shipment, fall upon the seller, but import duties are payable by the buyer in the absence of stipulation to the contrary, and if the seller is obliged to pay them, he can recover the amount from the buyer (5.

(*ii*) *Payment*

Time of payment.

In a *c.i.f.* contract where there is no express stipulation to the contrary, payment and tender of the documents, not payment and delivery of the goods, are concurrent conditions (6). The term "net cash" is equivalent to "net cash aginst documents" and does not postpone the liability of the buyer to pay for the goods (7). The buyer cannot insist on the right of inspection as a condition precedent to payment. The buyer's right to inspect the goods and reject them if they are not in conformity with the contract, nevertheless remains unimpaired (8).

The buyer is bound to pay the price against the shipping documents irrespective of the ship (9). If there is a term as to arrival of the ship, it only denotes the time when payment is due, and is not a condition of payment (10).

Payment by acceptance of bill of exchanoe.

In commercial practice it is common for the contract to provide that instead of payment becoming due in cash upon tender of the documents, the buyer shall accept a bill of exchange payable at a later date drawn upon him by the seller. In such a case it is the duty of the buyer, on tender of the bill of exchange together with the documents, to accept the bill of exchange;

(1) Manbre Saccharine Co. v. Corn Products Co (1919) 1 K. B. 198.
(2) Malmerg v. Evans (1924) 29 Com. Cas. 235.
(3) Parker v Schuller (1901) 17 T. L. R. 299 C. A., Crozier v. Auerbach (1908) 2 K. B. 161, C. A.
(4) Sharpe v. Nosawa (1917) 2 K. B. 814; distinguished in Produce Brokers v. Weis & Co. (1918) 87 L. J. K. B. 472.
(5) American Commerce Co. Ltd. v. Boehm (Frederick) Ltd. (1919), 35 T. L. R. 224: See Halsbury, Laws of England, 2nd, Edn. Vol. XXIX, p. 219.
(6) E. Clemens Horst Co. v. Biddell Brothers, (1912) A. C. 18.
(7) Biddell Bros. v. E. Clemens Horst Co. (1911) 1 K. B. 934, C. A., p. 954.
(8) Palenghi v. Dried Milk Co. (1904) 92 L. T. 64; 10 Com. Cas. 42.
(9) See Mohan Lal v. Krishna (1928) 18 Bom. L. R. 415, at p. 422.
(10) See Kennedy on C. I. F. Contracts, 2nd Ed., p. 7.

if he does not do so he must return the bill of lading and the property in the goods does not pass to him (1). If the contract provides that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft upon tender of the proper shipping documents. This he must do even though the goods be lost or destroyed at the time when the draft is presented (2).

Where the buyers, who had accepted the bill of exchange sent to them along with the shipping documents and also the shipping documents, refused to honour the bills at maturity, they were held liable to pay interest after the due date (3).

It has been held that purchaser under a *c.i f.* contract is entitled to ask for a bill of lading, and he is not bound to pay upon proof merely that the goods have arrived at the port of daparture (4). It is open to the parties to a *c i f.* contract to substitute by agreement a delivery order for a bill of lading. Such a variation does not affect the essentials of c.i.f. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer (5). It is the duty of the consignor of goods under a c i.f., contract to tender to the consignee the bill of lading and insurance policy before the price is demanded, and a delivery telegram sent by the shipping company is not equivalent to the bill of lading In the absence of the usual documents of title, the consingnee is entitled to inspect the goods and satisfy himself as to the same (6).

Banker's confirmed credit.

"Where under a "c.i.f." contract it is expressly provided that payment shall be through a "banker's credit," it is a condition of the contract that the buyer should within a reasonable time make the necessary arrangements with a responsible banker to issue a letter of credit in favour of the seller, under which the banker gives an undertaking to the seller to accept or pay, as the case may be, in exchange for shipping documents, bills of exchange drawn upon him by the seller for the price of the goods. If the contract of sale, as is usual, calls for a "confirmed credit," it is not satisfied by the buyer procuring a letter of credit which is revocable. The mutual rights and liabilities as between the buyer and the banker are regulated by the terms of the contract between them under which the banker agrees to issue the required credit. Normally the banker stipulates that he will retain the documents of title as security until he has been reimbursed by the buyer. So far as the seller is concerned, however, the notification by the banker to the seller of the confirmed credit in his favour creates, at least when acted upon by the seller, an enforceable contract between the seller and the banker whereby the latter contracts to honour drafts drawn upon him in accordance with the terms of the notification. The contract between the banker and the seller thus made must be read by itself. It does not, without express

(1) See Halsbury, Laws of England, 2nd Edn, vol. XXIX. p. 219.
(2) Bubby Burry v. Hertz (1928) 4 Lah. 215 following E. Clemens Horst v. Biddell Bros., supra.
(3) Marshall v. Naginchand (1916) 18 Bom. L. R 915.
(4) Nissim I. Bekhor v. Haji Sultanalli Shustary, supra.
(5) Steel Bros. v. Dayal A. 1. R. 1924 Bom. 247=87 I. C. 67=47 Bom. 924. (1923) 25 Bom. L.R. 1068 citing in re Denbigh v. Atcherley (1921) 90 L. J. K. B. 836. A summary of the important English cases on c. i. f. contracts is given in the judgment; but see Mohanlal v. Krishna (1928) 30 Bom. L. R. 415. at p. 420.
(6) Steel Bros. v. Dayal. supra.

words, incorporate the terms of the contract between the buyer and the seller" (1).

Contract for sale of goods to be delivered in two instalments-wrongful refused by buyer to take delivery of first instalments-right of seller to cancel contract and claim damages.

In deciding whether there has been a repudiation of the contract regard must be had to the ratio quantitatively which the breach bears to the contract and the degree of probability or improbability that the breach will be repeated. When there is a contract for the sale of goods to be delivered in two equal instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for ony loss suffered by him. (2).

Freight insurance and wharfage

In a c. i. f. contract the seller as between himself and the buyer is chargeable with the amount of the freight and the insurance charges, and the buyer, if he has paid either of those charges may take credit therefor (3). In *Acme Wood. Co v Sutherland* (4), goods were sold "cost, freight and insurance to Buyer's Wharf Victoria Dock. London," and the goods were discharged in London elsewhere than at Buyer's Wharf, and under the "London Clause" in the bill of lading certain charges were paid. It was held that these London charges fell upon the seller, and not upon the buyer. Of course, the seller fulfils his contract when he puts the goods on board ship, and hands to the consignee shipping documents and a policy of insurance in conformity with the contract, and in such a case, the consignee would be liable to pay any charges in the nature of wharfage charges on the goods.

Passing of Property

In the case of a *c.i.f.* contract the question whether the property in the goods has passed from the seller to the buyer depends entirely on the question whether the seller has parted with the control over the disposal of the goods. When an agreement is made for the sale of specific goods in a deliverable state on "*c. i. f.*" terms it is not an unconditional contract because the commercial meaning of "*c.i.f.*" imports an undertaking by the seller to do something more, namely, to put the goods on a ship and this postpones the passing of the property until the goods are shipped by the seller (5). But the presumption that the property passes upon shipment is a presumption as to the intention of the parties, and may be excluded either by the express terms of the contract or by other circumstances (6). In particular it is rebutted where, as is generally the case in a *c.i.f.* contract, the seller reserves the right of disposal of the goods until certain conditions laid down at the time of the contract or appropri-

(1) Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 220.

(2) Sha Moolchand, Kesarimull v. Associated Agencies, 1941 M W.N. 769=54 L.W. 217.

(3) Ireland v. Livingston (1872) L.R. 5 H.L. 395, at p. 406; Wancke v. Wingren (1850) 58 L.J.Q.B. 519; Houlder v. Public Works Commissioners (1908) A.C. 276, 290 (P.C.).

(4) (1904) 9 Com. Cas. 170

(5) Biddell Brothers v. E. Clemens Horst and Co. (1911) 1 K. B. 934, C.A.

(6) See Sec. 19 (3) of the Act.

ation are fulfilled (1). In such a case the property does not fall until fulfilment of the conditions. It may also be rebutted where the facts of the case show that the seller never intended the mere act of shipment to operate as an appropriation of the goods to the contract either conditionally or at all (2).

Since upon shipment the goods pass out of the physical possession of the seller, his intention to reserve the right of disposal is usually evinced by his dealing with the bill of lading. He is *prima facie* deemed to reserve the right of disposal when he takes the bill of lading to his own order or to that of his agent (3), but this inference being *prima facie* only, may be excluded by other circumstances (4). If the seller endorses the bill of lading in blank and hands it over to his agent for delivery with instructions that they shall not hand it over until the goods are paid for, then the seller has shown his intention to retain the disposal of the goods under his control (5).

When the seller claims to retain the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until then property in goods does not pass to the buyer (6).

Where goods are shifted on "*c i. f. c. i.*" (the last two letters standing for "commission and interest" terms, and documents are sent to a Bank to be delivered on acceptance of the draft, the property in the goods does not pass to the consignee when the goods are shipped (7). In such a case the consignor is not entitled to include in the amount of the bank draft amounts which have no relation to the contract, or which the consignor is not entitled to charge (8).

In *Tregellis* v. *Sewell* (9), the plaintiff bought of the defendant 300 tons old Bridge rails at £ 5 14 s 6d per ton, delivered at Harburg, cost, freight and insurance ; payment net cash in London less freight upon handing bill of lading and policy of insurance". It was held that according to the true construction of the contract the defendant did not undertake to deliver the iron at Harburg, but when he put it on board a ship bound for that place and handed to the plaintiff the policy of insurance and other shipping documents, the property in the goods passed to the purchaser.

Even where the bill of lading is made out to the buyer's order, if the seller retains possession of it until tender of the price, this

(1) See Sec. 25 of the Act.

(2) Cf. Wait v Baker. (1848) 2 Exch 1 ; Gabarron v. Kreeft; Kreeft v. Thompson (1875) L R. 10 Exch. 274.

(3) Halsbury, Laws of England, 2nd Edn. Vol. XXIX p. 212; The Prinz Adalbert (1917) A.C. 586, P.C.

(4) Halsbury, Laws of England, 2nd Edn. Vol. XXIX, page 222 ; The Parchin (1918) A. C. 157, P. C. at pp. 170, 171 ; cf. EastWood & Holt v. Studu (1926), 31 Com Cas. 251, per Roche J. at p. 225.

(5) Bank of Morvi Ltd. v. Baerlein Brothers (1924) 26 Bom. L. R. 155, A I. R. 1924 Bom 325.

(6) Gulab Rai-Sagar v. Nirbhe Ram. Nagar, A. I R. 1924 Lah. 289 ; 4 Lah. 423 ; 79 I C. 194 ; See also Mirabita v. Imperial Ottoman Bank. (1878) 3 Ex. D. 164, 172 ; Ford Automobiles v. Delhi Motor Co. (1922) 24 Bom L. R. 1140.

(7) Mehta v. Heureux, A. I. R. 1924 Bom. 4 22; 26 Bom L. R. 382 ; 80 I. C 766. See also Mohanlal v. Krishna (1928) 30 Bom. L. R. 415.

(8) Ibid.

(9) (1862) 7 H. & N. 574 ; 126 R. R 558 Affd. (1863) 7 H. & N. 584, Ex. Ch.

also may be some evidence of an intention to reserve the right of disposal (1).

"If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract. This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract he does nothing inconsistent with an intention to pass the property and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract" (2).

Passing of the risk.

In a *c.i.f.* contract the incidence of the risk is separate from the passing of the property Under this contract the buyer is in effect the insurer and the risk *prima facie* attaches to him as and after shipment(1). This is, of course, subject to the seller's obligation, which is a condition precedent to tender such shifting documents (including a policy of insurance) as are contemplated by the contract as are usual (2).

In a *c.i.f.* contract there is no warranty by the seller that at the time of the tender of the documents the goods are not lost (3). Even where the seller knows at the time of tender that the goods are already lost the buyer is still under an obligation to pay for them (4). He has his remedy either under the contract of affreightment against the shipowners or under the policy of insurance against the insurers, and this under the *c.i.f.* contract, was what he bargained to get.

The seller is not bound to insure against war risks even if war is imminent when the contract is entered into (5), and, if he pays extra premium for insurance against such risks he cannot recover it from the buyer, (6).

Remedies of the buyer—right of rejection.

If under the ordinary *c.i.f.* contract the goods do not arrive at their destination, the consignee, having received the shipping documents and the policy of insurance has his remedy either against the shipowner or on the policy (7).

The buyer by acceptance of the documents does not thereby lose his right to reject the goods on actual delivery, if the goods are

(1) The Kronprinsessan Margareta, The Parana, (1921) I. A. C. 486, at p. 511; see Arnhold Karberg & Co. v. Blythe (1915) 2 K. B. 879, at p. 387.

(2) Halsbury, Laws of England, 2nd Edn. Vol. XXIX, pp. 222, 223 and authorities cited thereunder.

(1) Biddell Bros. v. E. Clemens Horst & Co, (1911) 1 K. B. 934. C. A; Wancke v. wingren (1889) 58 L. J. Q. B. 519; Tregelles v. Sewell, supra.

(2) Groom v. Barber (1915) 1 K. B. 316; Karberg v. Blythe (1916) 1 K. B. 495.

(3) Groom v. Barber supra; Re Weis & Co., Ltd. & Credit Colonial et Commercial, Antwerp, (1916) 1 K. B. 346.

(4) Manbre Saccharine Co. v. Corn Products Co (1919) 1 K. B. 198.

(5) Law & Bonar v. British American Tobacco Co. (1916) 2 K. B. 605.

(6) Nissim I. Bekhor v. Haji Sultanalli Shustary (1915) 17 Bom. L. R. 249.

(7) Acme Wood Flooring Co. v. Sutherland (1904) 9 Com. Cas. 170.

not in accordance with the contract (1). The place of delivery is *prima facie* the proper place for inspection (2) but the circumstances of the case may show that some other and later stage is the appropriate place. In particular, where the goods to the knowledge of the seller are purchased by the buyer for delivery to a further destination, and the nature of the goods and the way in which they are packed makes it unreasonable to inspect immediately on delivery, the right to reject will be extended to the later date (3). The right to reject is lost by unreasonable delay in rejecting, or by the buyer doing an act in relation to the goods inconsistent with the ownership of the seller. Resale of the goods before inspection, *e.g.*, by transfer of the bill of lading to a third party is such an act but it would seem that a mere pledge of the documents of title would not be such an act (4).

Where the buyer claims damages for non-delivery and there is an available market price for the goods, the measure of damage is *prima facie* the difference between the contract price and the market price of similar goods on *c.i.f.* terms at the time at which the documents ought to have been delivered (5). The date at which the goods themselves should have been delivered is irrelevant (6).

It has been held under the English law that in an ordinary *c.i.f.* contract for the sale of unascertained goods the buyer's remedy of specific performance will seldom be granted by the Court. The unpaid seller of goods under a *c.i.f.* contract possesses the normal rights reserved by the Act, namely, the right to withhold delivery, the unpaid seller's lien, and the right of stoppage *in transitu*. Generally under a *c.i.f.* contract the position of the unpaid seller is safeguarded by his ability to withhold delivery so long as he retains the shipping documents; after that as the goods themselves are not in his possession but in the possession of the shipowner, he is normally thrown back on his right of stoppage *in transitu* if the buyer becomes insolvent (7).

Interpretation of C.I.F. contract.

If the typewritten and printed portions of a contract can be read together effect must, of course be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion the typewritten portion must prevail (8).

"F.O.B." Contracts.

"F.O.B." means free on board. Under an ordinary f.o.b. contract the seller must deliver the goods on board ship at his own expense for carriage to the buyer. Thereupon the seller's contractual liability ceases, delivery is complete, and the property and risk in goods pass to the buyer. Normally the terms of the contract either

(1) Polenghi Bros. v. Dried Milk Co. Ltd. (1904) 10 Com. Cas. 42.
(2) Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Saunt v. Belcher and Gibbons, (1920) 26 Com Cas. 115.
(3) Van den Hurk v. Martens (1920) 1 K. B. 850; Hardy & Co. v. Hillerns (1923) 1 K. B. 658.
(4) Halsbury, Laws of England 2nd Edn. Vol. XXIX, page 224; Hardy & Co. v. Hillerns, Supra.
(5) Sharpe (c) & Co. v. Nasawa & Co. (1927) 2 K. B. 814.
(6) Ibid.
(7) Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 225 and authorities cited thereunder.
(8) Sha moolchand Kesarimull v. Associated Agencies, 1941 M. W. N. 769=54 L. W. 217.

specify the ship or line upon which the goods are to be loaded or entitle the buyer to give subsequent instructions to the seller in regard to shipment. The contract of carriage may be made by the buyer himself or it may be made by the seller on the buyer's behalf, and the buyer is liable for the freight and all subsequent charges (1). If the "*f.o.b.*" contract does require the seller to make the contract of carriage or is silent as to who shall make it, the duty of the seller is then to give up possession of the goods to the ship upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. "The seller having paid the charges of shipment gives up possession of the goods to the ship upon terms of a reasonable and ordinary bill of lading or other contract of carriage. There, his contractual liability as seller ceases, and delivery to the buyer is complete so far as he is concerned (2)." The goods are then at the risk of the buyer, he is responsible for the freight, and subject to the seller reserving the right of disposal, the property passes to the buyer (3), and even if, as sometimes happens, the goods are not specific or ascertained when put on board, as when they form part of a large quatity, the price being payable against the bill of lading they are still at the risk of the buyer and he has an insurable interest in them, and must pay the price on presentment of the bill of lading even if the goods have been lost (4).

Insurance.

It is also the seller's duty to give such notice to the buyer as may enable him to insure the goods during their sea transit (5). It has, however, been doubted if section 39 (3) of the Act applies to a *f.o.b.* contract (6). The signed contract of sale "*f.o.b*" normally contains sufficient information to enable the buyer to insure the goods under an open policy without any additional notice from the seller of actual shipment, and in such circumstances the seller is under no duty to give a further notice (7) "*F.o.b.*" contracts also frequently contain a clause instructing the seller to effect the insurance as agent for the buyer, and add the premium to the price.

Risk.

The risk passes to the buyer upon shipment (8) although the passing of the property may have been postponed.

When property passes

Prima facie the property passes to the buyer upon shipment (9) but as in a "c i f" contract the inference may be rebutted and the moment of the passing of the property postponed, as for instance, where the seller deals with the bill of lading

(1) Stock v. Inglis (1884) 12 Q. B D. 564, C. A : on appeal, sub nom Inglis v. Stock (1885), 10 App Cas 263.

(2) Wimble v. Rosenberg, (1913) 3 K. B. 743. C. A per Hamilton L J. See also Cunningham Ltd. v. Robert A. Munro & Co., Ltd, (1922) 28 Com. Cas. 42, 45. The seller, therefore, is under no obligation to obtain a licence to export the goods if such a licence be necessary, H. C. Brandt & Co. v. H. N. Morris & Co. (1917) 2 K. B. 784, C. A.

(3) Browne v. Hare (1858) 3 H. & N. 484, 4 H. & N. 822; 117 R. R. 811; 118 R. R. 786, Ex. Ch. Alexander v. Gardner (1885), Bing N. C. 671, 41 R. R. 651. In this case the price was to be paid by bill at two months from the landing of the goods, but this was held not to be a condition of payment but merely a provision fixing the time of payment, which therefore was two months after the goods ought in the ordinary course to have arrived cf. Fragano v. Long (1825) 4 B. & C. 219, 28 R R 226.

(4) Stock v. Inglis (1889) 12 Q. B. D. 564. C. A

(5) S. 39 (3) of the Act; See also Wimble v. Rosenberg, supra; Northern Steel and Hardware Co. v. Batt (John) & Co. (1917) 33 T. L. R. 516, C. A.

(6) See notes on pages 438 to 440.

(7) Ibid.

(8) Stock v. Inglis, supra.

(9) Ibid; Browne v. Hare (1859) 4 H. & N. 822.

in such a manner as to show that he did not intend to appropriate goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they be payment in cash or by acceptance of a bill of exchange (1).

Although, if nothing is said, payment is due upon delivery of the goods by the seller to the ship (2); in ordinary practice the "*f.o.b.*" contract contains special terms for payment analogous to those common in c.i.f. contracts, and payment is frequently made by "cash against documents" or by the acceptance by the buyer's agent at the port of loading of a bill of exchange against tender of the bill of lading. Where special terms of this kind are made with respect to payment, the effect is often an agreement that the property shall not pass upon shipment but only upon performance by the buyer of some other condition, such as acceptance of the bill of exchange tendered with the bill of lading (3). **Payment.**

The delivery contemplated by an "*f.o.b.*" contract is delivery on board ship. The buyer is not entitled to demand delivery in any other manner than on board ship (4), and conversely if the buyer fails to name a ship, the seller's only remedy is to sue for damages for breach of contract; he cannot sue for the price (5). Or in other words, the condition that the goods should be put on board is a condition which operates in favour of both parties and cannot be waived by either as if it were a condition inserted for his benefit only. If a part is named, the same rule applies (6). **Shipment.**

Where the ship on which delivery is to be made by the seller is not expressly specified in the contract, it is the duty of the buyer to name an effective ship (7) in time for the seller to ship the goods *i.e.*, to bring the goods alongside and perform the shipper's part of the operations of loading, so as to enable the buyer to receive them within the contract time (8) where as is usual, the property does not pass until the goods are loaded even although his inability to load was caused by the buyer's failure to name an effective ship (9). In such a case his remedy is in damages.

The price quoted in an "*f.o.b.*" contract covers all expenses up to and including delivery on board the named ship. Thereafter all further expenses fall upon the buyer. These expenses include freight, the cost of export duties and of import duties and of obtaining, where necessary, a licence to export (10). **Price.**

The buyer is not, in the absence of a special term or usage, under any duty to inspect the goods before shipment, and there is no **Right of rejection.**

(1) See Halsbury, Laws of England, 2nd Edn. Vol. XXIX, p. 226.
(2) See Sec. 32 of the Act.
(3) See Halsbury, Laws of England. 2nd Edn., Vol. XXIX, p. 226.
(4) Wackerbarth v. Masson (1812) 3 Camp. 270: Maine Spinning Co. v. Sutcliffe & Co. (1917) 23 Com. Cas. 216.
(5) Colley v. Overseas Exporters (1921) 3 K. B. 303. See also notes under S. 55.
(6) Dayton Price & Co. v. Bohomotollah A. I. 1925 Cal. 609=86 I. C. 571.
(7) Inglis v. Stock (1885); 10 App. cas. 263; Brandt & Co. v. Morris (1917) 2 K. B. 784, C. A.
(8) Cunningham v. Munro & Co. Ltd. (1922) 28 Com. cas. 42, at p.45.
(9) Colley v. Overseas Exporters (1921) 3 K. B 302. Where the contract expressly or by implication through the existence of a trade usage authorises the seller to deliver to the ship's, agent on land in exchange for a "received for shipment" bill of lading, the above rules will apply mutatis mutandis.
(10) Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 227.

general law that the place of shipment is the place of inspection (1), although the buyer is entitled to reject even before shipment if he inspects the goods then and finds them not up to contract (2). The appropriate place for inspection by the buyer is a question of fact depending upon the circumstances of the case. It is normally the place of delivery of the goods in the buyer's country, but if the goods are bought for resale and are of a kind which cannot without injury be opened and reclosed, the proper place may be the premises of the final buyer (3).

"Ex-ship" contracts.

Under the ordinary "Ex-ship" contract the seller undertakes to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for delivery of goods of the kind in question. The seller has to pay the freight or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Neither the risk nor the property passes to the buyer until the goods are over the ship's sail at the port of delivery. Otherwise this form of contract does not differ in its incidents from an ordinary inland contract of sale of goods providing for a particular place of delivery (4).

In *Yangtsze Insurance Association, Ltd.* v. *Luknlanjee* (5), the contract was for the sale of "200 tons of Indian first class teak squares at Rs. 175 per ton ex-ship. Shipment November—December at the rate of 100 tons monthly. Payment cash against documents." 144 logs out of a parcel of 382 shipped on board at Colombo constituted the first instalment of this contract but after being discharged over the side of the ship, were lost in a gale. It was common ground that at that time they had been paid for and were the property of the buyers.

The sellers had insured. The whole parcel of 382 pieces "as well as in his or their own name as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all," and the policy covered "all risk of craft and, or raft from land to land." The buyer claimed the right to sue on this policy, and in holding that he had no such right the Court said:—

"Two suggestions were made in argument: one was that 'against documents' means in the language of commerce against a policy of insurance and sundry other documents; the other, that an obligation binding the sellers to insure on the buyer's behalf, might be inferred because the effect of the contract was to require payment not merely against goods delivered ex-ship in a state corresponding to the contract description but also against documents representing the goods, even though, through sea perils, they were no longer in a state corresponding to the contract description.

(1) Boks & Co. v. Rayner & Co. (1921), 37 T L.R. 800, C.A.
(2) Cunningham Ltd. v. Munro & Co. Ltd, (1922) 28 Com. Cas. 42.
(3) Saunt v. Belcher and Gibbons, Ltd. (1920), 26 Com. Cas. 115; Van den Hurk v. Martens, (1920), 1 K.B. 850; Molling & Co. v. Dean & Son. Ltd. (1901), 18 T.L.R. 217.
(4) Halsbury, Laws of England, 2nd Edn., Vol. XXIX, p. 228.
(5) (1918) A.C. 585, P.C.

"The first point fails because there is no evidence to show that the word "documents" in such a connection includes a policy of insurance. A contract of sale, at a price *c.f.* and *i*, is so well understood that no proof is needed that one of the documents which it contemplates is a policy. It may be that, detached from any context, the mere expression 'shipping documents' would suggest that one of them is a policy. When, however, the expression is found in a contract, and there is nothing but the language of the contract to determine its meaning, it must be construed as meaning such documents as are appropriate to the contract. In the case of sale "ex-ship" the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery of goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest upon goods, nor any interest which the seller, as seller, is bound to insure for him. If the seller insures, he does so for his own purposes and of his own motion.

"Again, the mere documents do not take the place of the goods under such a contract. They are not the subject matter of the sale. If an endorsed bill of lading is delivered to the buyer, it is given as a delivery order and not with any intention of making him a party liable upon it, or of vesting him with the property in the goods by the mere delivery of the document. As the goods are not at the buyer's risk during the voyage, there is nothing from which to infer an obligation on the seller, and therefore an intention on his part, to effect an insurance on the buyer's behalf.

"It was said that 'cash against documents,' first of all implied some document other than a delivery order because of the use of the plural, and secondly, must have reference to the risks of the voyage so as to make the contract analogous to a *c. f.* and *i.* sale since if 'documents' only meant 'delivery' of the goods, this would be implied by law. The answer seems to be, on the first point, that the plural 'documents' would be satisfied either by two delivery orders, one for each shipment, or by two documents, a delivery order and a receipt for the freight, in the case of each shipment. On the second point there is nothing surprising if such a contract is found to express something which the law would imply, and certainly there is nothing in it to compel a Court to give simple and well-known words a meaning which does not belong to them, and which does belong to other words or letters equally well-known though not so simple. In truth, however, 'cash against documents', does carry the matter beyond 'cash on delivery', that is, delivery of the goods, for it imports a convenient mercantile way of effecting the same object without the inconvenience of a payment at or contemporaneous with the discharge overside. It was admitted that payment could not be demanded, even 'against documents' till the ship had arrived with the goods. The provision enables payment to be made in a counting-house, and in the ordinary course of business, without reference to the precise stage which the process of tumbling the logs into the water may happen to have reached."

APPENDIX I

Provisions of the English Statutes relating to contracts of sale for £10 and upwards.

The Statute of Frauds (29 Car. 2, c. 3).

Sec. 17.—"And from and after the said four and twentieth day of June (1677) no contract for the sale of any goods, wares and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The Statute of Frauds Amendment Act, 1828, (9. Geo. 4, c. 14) commonly called Lord Tenderden's Act.

Sec. 7.—"Be it enacted, that the said enactment (*a*)shall extend to all contracts for the sale of goods of the valne of ten pounds sterling and upwards' not withstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery."

The Sale of Goods Act, 1893, (56 and 57 Vic. C. 71), (*b*) Sec. 4:—

(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions ef this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

GENERAL INDEX